No. 20553



In the

# United States Court of Appeals

*For the Ninth Circuit*



ANGUS J. DEPINTO,
*Appellant,*

and

JAMES P. DONOHUE, as Trustee in Bankruptcy of the Estate of Angus J. DePinto,
*Intervenor-Appellant,*

vs.

PROVIDENT SECURITY LIFE INSURANCE COMPANY, and ALBERT J. DOIG,
*Appellees.*

## Opening Brief of Appellant, Angus J. DePinto, and Intervenor-Appellant, James P. Donohue

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(For convenience, the individual parties will be referred to by their last names. Provident Security Life Insurance Company will be referred to as "Provident". United Security Life will be referred to as "United", American Security Investment Company will be referred to as "American". "T.R." refers to Transcript of Record; "R.T." refers to Reporter's Transcript; "O.T." refers to the Original Transcript of Record in Cause No. 18245.)

A.

## JURISDICTION

This Action originated in the United States District Court for the District of Arizona as a shareholders' derivative action. Jurisdiction was based on 28 U.S.C.A. § 1332. (T.R. 1) From an adverse judgment, DePinto instituted this appeal pursuant to Rule 73 of the Federal Rules of Civil Procedure. 28 U.S.C.A. § 1291 grants to this Court jurisdiction to review the judgment of the lower Court.

B.

## STATEMENT OF THE CASE

### 1. Proceedings in Lower Court.

This action was instituted by one John S. Gorsuch against United Security Life, James E. Kelly, L. N. Kelly, Patrick J. Kelly, Nina Dunn, J. L. Jenkins, Angus J. DePinto, Elmer W. Duhame, American Security Investment Co., Roslyn B. Croydon, Vernon E. Niesz, John D. Ballantyne, Edwin B. Pegram and United Finance Corporation. By his amended complaint, Gorsuch sought to recover on behalf of United the sum of $463,238.33, consisting of (1) $45,514.51, alleged to have been paid by United to James E. Kelly after he had resigned as an officer and director of United, (2) $109,723.82, alleged to have been disbursed by United to United Finance Corporation, and (3) the sum of $308,000, alleged to have been transferred from United to American Security Investment Co. in return for 30,800 shares of the latter's stock. (T.R. 1) The case was tried to a jury which returned a special verdict in favor of DePinto. (O.T. 304) The trial Judge, nevertheless, entered judgment against DePinto and in favor of United for the sum of $314,794.19. Judgment for a like amount was entered against the other individual defendants, excepting that, in the case of James E. Kelly, L. N. Kelly, Nina Dunn, J. L. Jenkins, John D. Ballantyne and Roslyn B. Croydon, the judgment was

limited to $308,000, as the result of stipulations entered into between them and plaintiff prior to trial. The claim based upon alleged disbursements to Kelly (stated in the complaint as $45,514.51, and in the pretrial order as $46,839.51), and the claim based upon the alleged disbursement by United of $109,723.82 to United Finance Corporation, were dismissed on the merits and with prejudice. (T.R. 24, O.T. 354)

A number of the defendants, including DePinto, appealed to this Court (Cause No. 17114), and the judgment was reversed in *Niesz v. Gorsuch,* 295 F.2d 909 (9th Cir. 1961). Upon remand to the District Court, further proceedings were had including the joinder of Provident (aligned by the trial Court as a defendant), and Albert J. Doig, as plaintiff. The complaints filed by Provident and Doig each sought to recover from the defendants, and on behalf of Provident, the sum of $314,794.19, on account of assets which were alleged to have been transferred from United to American on or about October 18, 1957. (T.R. 26, 44) Another judgment (the second) was entered against the defendants, including DePinto. (O.T. 1746) A second appeal was taken to this Court (Cause No. 18245) and, again, there was a reversal. *DePinto v. Provident Security Life Insurance Company,* 323 F.2d 826 (9th Cir. 1963).

Upon remand, the case was set for trial before a jury as to the defendants DePinto, Landoe, Sabo, Pegram, and the Executors of the Estate of Elmer W. Duhame, deceased. (T.R. 288) On the eve of trial, the Duhame Executors agreed to pay to Provident the sum of $100,000, in consideration of a covenant-not-to-sue. (T.R. 206-234, 267) At the request of plaintiff Doig, and over the objection of DePinto, the trial Court entered an order severing the cause as to the remaining defendants, Sabo, Pegram and Landoe, and ordering that the case would proceed to trial against DePinto as the sole defendant. (R.T. 166-171; T.R. 292) After the introduction of all evidence, DePinto moved for a

directed verdict. (R.T. 551; T.R. 292) This was denied and the jury returned a verdict in favor of Provident and against DePinto in the sum of $314,794.19, upon which the Court entered judgment. (T.R. 235, 262) DePinto, pursuant to the provisions of Rule 50(b) of the Federal Rules of Civil Procedure, moved for judgment in accordance with his motion for directed verdict or, in the alternative, for a new trial. (T.R. 254, 263) Upon the denial thereof, this appeal was instituted. (T.R. 273, 274)

Subsequent to the institution of this appeal, DePinto was adjudicated a bankrupt and James P. Donohue was appointed as Trustee in Bankruptcy of the DePinto Estate. On the 15th of June, 1966, an order was entered herein granting the Petition of the Trustee to intervene herein.

**2. Facts.**

In the year 1952, Kelly organized United as a Stock Life Insurance Company, under the laws of the State of Arizona. From the time of its organization until October 18, 1957, the management of United was under the direction and control of Kelly, although he resigned as President and Director in July of 1956. (R.T. 185, 206) Of a total of 100,000 shares of United stock outstanding, Kelly owned 35,149 shares, which gave him control. (R.T. 209, 305)

DePinto has practiced medicine in Phoenix, Arizona since 1936 as a specialist in obstetrics and gynecology. He and Kelly became friends in 1947. (R.T. 494) As a result of that friendship, and at the request of Kelly, DePinto became a member of the Board of Directors of United on October 14, 1955. His purpose in consenting to become a member of the Board of Directors of United was to help Kelly. He did not intend to be an active member of the Board, and did not attend meetings of the Board. (R.T. 197-199, 208-209, 314, 495)

In the early part of 1957, Kelly retained Croydon and Frederick Heineman, a lawyer, to sell his stock in United on a com-

mission basis. (R.T. 291) On October 17, 1957, American was organized under the laws of the State of Arizona, with Sabo, Pegram, Landoe, Croydon, Niesz and Ballantyne as incorporators. (R.T. 210)

A few days prior to October 18, 1957, Kelly told DePinto that some reputable people—insurance people and a doctor from Montana—were buying his stock in United. He advised DePinto that the purchasers intended to increase the surplus of the company up to $260,000; that the money for the purchase of his stock was coming from Dr. Sabo and the other investors. (R.T. 292, 498, 511) Kelly suggested to DePinto that he resign from the Board of United, because of the imminent sale of Kelly's stock and the transfer of control to the purchasers. (R.T. 210-211) A resignation from the Board of Directors of United was signed by DePinto on October 17 or 18, 1957. (R.T. 311) The minutes of a meeting of the Board of Directors of United held on October 18, 1957, at 4:00 P.M., disclose that directors Dunn, DePinto and Jenkins adopted a resolution reading as follows:

> "RESOLVED that the resignations of A. Thomas Duncan, Patrick J. Kelly, E. Hartley Brown, T. J. Flaherty, and Spence Reese as directors of United Security Life be and they are hereby accepted.
>
> "RESOLVED that Vernon E. Niesz, John D. Ballantyne, Roslyn B. Croydon, Frank I. Sabo, Edwin B. Pegram and Harry T. Goss be and they are hereby elected directors of United Security Life, each to serve until the annual meeting of shareholders in 1958, or until his resignation, or death, or until his successor is elected, whichever is earliest." (Ex. 5G)

At a meeting of the Board of Directors of United held at 4:15 P.M. on October 18, 1957, DePinto's resignation as a member of United's Board of Directors was accepted. (R.T. 518) The minutes of said meeting read, in part:

"On motion made, seconded and unanimously carried, it was

"RESOLVED that the resignations of N. J. Dunn, J. L. Jenkins and Angus J. DePinto, M.D., be and they are hereby accepted.

* * * * * * *

"RESOLVED that the corporation subscribe for 30,800 class A common shares of American Security Investment Co. at a price of $10.00 per share to be purchased immediately for a total consideration of $308,000.00 consisting of assets now owned by the corporation and cash referred to in the following items numbered 1 through 6:

"1. Note and first mortgage made by Mrs. H. M. McKinley and having a present unpaid balance of principal and interest of $33,424.12.

"2. Note and first mortgage made by Forrest R. and Lois Newville and having a present balance of principal and interest of $10,874.35.

"3. Bonds having a present book value of $16,370.18 as follows:

* * * * * * *

"4. Certificates of deposit having a total present value of $127,012.50 as follows:

* * * * * * *

"5. Three promissory notes made by United Finance Corp. having a present unpaid balance of principal and interest aggregating $87,626.88.

"6. Cash of $32,691.97.

"RESOLVED that the corporation subscribe for 4,200 class A common shares of American Security Investment Co. at a price of $10,000 per share to be purchased on or before February 1, 1958, for a total consideration of $42,000.00 to be paid in cash on or before February 1, 1958.

"RESOLVED that the president and secretary of the corporation be and they are hereby authorized and directed to effect the sale and the purchase referred to herein, and to execute any and all contracts, instruments, checks or other

papers deemed necessary or desirable by them to consummate said transactions on behalf of the corporation." (Ex. 5H)

After October 18, 1957, DePinto had nothing to do with the affairs of United. Kelly did not offer DePinto any money or anything of value for his resignation from the Board of Directors. DePinto did not receive any of the proceeds from the sale of Kelly's stock. DePinto did not receive any money, benefit or compensation for his services as a Director of United. DePinto had no interest in American and did not receive any of the assets transferred from United to American. (R.T. 313-314, 495, 500-501)

On October 18, 1957, the Board of Directors of American adopted resolutions:

(a) That American sell to United 30,800 class A common shares of American for a consideration of $308,000, consisting of the assets referred to and described as items 1 through 6 in the United minutes of October 18, 1957, and hereinabove quoted from Exhibit 5H;

(b) That American sell to United 4,200 shares of its class A common stock for the sum of $42,000, to be paid in cash on or before February 1, 1958;

(c) That American accept the offer of James E. Kelly to sell 35,149.89 shares of United stock to American for $9.25 a share, and that American pay Kelly therefor by transferring to him the above-mentioned assets of United, plus additional cash in the amount of $17,136.48;

(d) That American accept the offer of United Family Guild to sell 3,650 common shares of United to American at $9.25 a share, payable in cash. (Ex. 50N)

On the same date, American entered into an agreement with Kelly, whereby American agreed to purchase from Kelly 35,149.89

shares of the stock of United, at a purchase price of $325,136.48. Among other things, said agreement provided:

> "3. TERMS: Said purchase price of $325,136.48 will be paid on or before 5:00 P.M., Friday, October 18, 1957, at the time of the delivery of said shares. Said purchase price will be paid by American as follows:
>
> "(a) Cash in the amount of $176,840.95;
>
> "(b) Bonds of the value of $16,370.18;
>
> "(c) Existing notes and mortgages owed by Kelly in the amount of $131,925.35." (Ex. 58)

At the same time, American entered into an agreement with Kelly to purchase certain accounts due agents of United (which Kelly had purchased), for the sum of $12,246.40, payable in stock of American. (Ex. 59) Also, at the same time, American entered into an agreement with United Family Guild to purchase 3,650 shares of the stock of United for the sum of $33,762.50 (Ex. 60)

The above-mentioned minutes of Boards of Directors meetings and rought drafts of the aforesaid agreements (Exs. A, B, and C), were prepared by Frederick Heineman. (R.T. 416, 424, 449) These documents were brought by Heineman to a meeting held in the law office of Jennings, Strouss, Salmon & Trask, Phoenix, Arizona, on October 18, 1957. (R.T. 433, 437) Among those present at the meeting were Mr. Earl Glenn, Frank Campbell and Riney Salmon of that firm. Also present were Croydon, Niesz, Ballantyne, Kelly and Dunn. Attorneys Frederick Heineman and Harry Goss were also present. (R.T. 300, 318, 323, 436) The drafts of the above-mentioned agreements were rewritten in the Salmon office. The contracts in final form were signed in the Salmon office. (R.T. 433, 435-436) Prior to the execution of the contracts, Heineman and Salmon had a discussion with respect to the legality of the transactions reflected in said contracts. (R.T. 442, 443, 456) Heineman and Salmon had no "legal misgivings" about the transaction. (R.T. 456)

On October 18, 1957, and pursuant to the above-mentioned agreements and resolutions of Boards of Directors, the following took place:

United transferred to American cash in the amount of $6,794.19, and assets hereinabove described having a face value of $308,000. (R.T. 212-214)

United received from American 30,800 shares of the Class A non-voting common stock of American.

The above-mentioned assets having a face value of $308,000, together with a check for $17,136.48, were delivered by American to Kelly. (R.T. 212-214, 330)

Had DePinto made an investigation of the various parties involved in the above-mentioned transaction, he would have learned:

Croydon was an actuary who had done work for the Insurance Department of the State of Arizona and several other large companies in the State and out of State. (R.T. 306) Ballantyne and Niesz were associated with Croydon and they were all "top people". Niesz was president of an Arizona insurance company and had an excellent reputation. (R.T. 309) Fred Heineman practiced law in Illinois and Arizona since 1931, specializing in insurance law. When Heineman came to Phoenix in 1954, he worked for Great Southwest Life Insurance Company, and after being admitted to the Arizona Bar in 1956, he incorporated and represented, perhaps, half a dozen life insurance companies. (R.T. 309-310) Riney Salmon, Frank Campbell and Earl Glenn were partners in the law firm of Jennings, Strouss, Salmon & Trask. Mr. Campbell's reputation for integrity, truth and veracity was the best. Mr. Salmon's reputation for professional ability and for integrity was the best. Earl Glenn was a former director of Securities for the Corporation Commission of the State of Arizona. (R.T. 307-310)

**3. Questions.**

The questions involved in this appeal are as follows:

1. Is there any evidence from which the jury was justified in finding that DePinto was guilty of negligence, which constituted a breach of his fiduciary duty as a director of United, and which proximately caused or contributed to cause the alleged loss to United resulting from the transfer of certain of its assets to American in exchange for American stock?

2. Is there any evidence from which the jury was justified in finding that United was damaged in the amount of $314,794.19, or any other amount, as the proximate result of any act or omission of DePinto as a member of the Board of Directors of United?

3. Did the trial Court err in the admission of evidence over the objection of DePinto?

4. Did the trial Court err in the rejection of evidence offered by DePinto?

5. Did the trial Court err in its instructions to the jury?

6. Did the trial Court err in failing to instruct the jury in accordance with the request of DePinto?

7. Did the trial Court err in giving instructions to the jury during their deliberations and not in open Court?

8. Was the judgment rendered against DePinto excessive in the following respects:

(a) As the result of the cancellation of 38,798 shares of United stock held by American and the surrender by the Duhame Estate of the right to participate in any recovery herein to the extent of 3,750 shares of stock, should the claim of $314,794.19 have been reduced to 57,452/100,000 thereof, namely $180,856.00.

(b) Should the claim against DePinto be reduced by the sum of $100,000, paid by the Duhame Executors in settlement of the claims against the Duhame Estate.

(c) Should any judgment against DePinto bear interest from October 18, 1957, or from the date of entry of judgment.

(d) In view of the entry of judgment against James E. Kelly and L. N. Kelly, Dunn, Jenkins, Croydon and Ballantyne in the amount of $308,000, and pursuant to stipulation, was DePinto discharged from all liability in excess of that amount.

9. Did the trial Court err in severing the action as to the defendants Sabo, Pegram and Landoe, and by permitting the trial of the action to proceed against DePinto alone?

10. Was DePinto deprived of a fair trial by reason of the failure of the trial Judge to withdraw from the case after the filing of an Affidavit of Bias or Prejudice?

C.

## SPECIFICATIONS OF ERROR

**Specification of Error No. 1.**

The trial Court erred in denying DePinto's Motion for Directed Verdict made at the close of all of the evidence for the reasons that:

(a) Plaintiff failed to prove the material allegations of his complaint;

(b) The undisputed evidence discloses that acts or omissions of DePinto, as a Director of United, did not proximately cause or contribute to cause any loss or damage to United; and

(c) There was no evidence from which the jury could have determined damages sustained by United other than by conjecture and speculation.

**Specification of Error No. 2.**

The trial Court erred in the admission of evidence over the objection of appellant, including:

(a) Facts and circumstances unrelated to the transaction of October 18, 1957, and

(b) Incompetent evidence relative to damages.

The full substance of the admitted evidence and the grounds urged at the trial for the objections thereto are set forth in Appendix "A", page 1.

**Specification of Error No. 3.**

The trial Court erred in rejecting evidence offered by appellant, including:

(a) Plans of the Niesz group and their consultations with lawyers and public officers;

(b) The reputations and backgrounds of members of the Niesz group; and

(c) Evidence as to damages.

The full substance of the rejected evidence and the grounds urged at the trial for the objections thereto are set forth in Appendix "B", page 7.

**Specification of Error No. 4.**

The trial Court erred in its charge to the jury. The portions of the Court's charge to the jury to which appellant objected are set forth *totidem verbis,* together with the grounds of the objections urged at the trial, in Appendix "C", page 23.

**Specification of Error No. 5.**

The trial Court erred in failing to charge the jury in accordance with the requested instructions of appellant. The requested in-

structions which were rejected by the trial Court are set forth *totidem verbis,* together with the grounds of the objections urged at the trial Court, in Appendix "D", page 29.

**Specification of Error No. 6.**

The trial Court erred in giving instructions to the jury during their deliberations and not in open Court, particularly:

"The three items of claimed damage are:

| | |
|---|---|
| 1) Cash, by check or bank certificates of deposit | $166,498.66 |
| 2) Promissory notes and accrued interest thereon | 87,626.88 |
| 3) Mortgages, bonds and accrued interest thereon | 60,668.65 |
| Total | $314,794.19" |

**Specification of Error No. 7.**

The trial Court erred in failing to limit the judgment entered against DePinto to an amount not exceeding $80,856, for the reasons:

(a) Under the terms of the merger agreement between Provident and United, and as a result of the settlement with the Duhame Executors, the former holders of United stock who will share in any recovery herein represent ownership of only a fraction (57,452/100,000) of United stock originally issued and outstanding. Therefore, the right of Provident to secure a judgment on behalf of the former United stockholders, who will share therein, is limited to 57,452/100,000 of the total claim, namely $180,856.

(b) DePinto and Duhame were sued in this action as joint tortfeasors; therefore, DePinto is entitled to a credit in the amount of $100,000, on account of the settlement made by the Duhame Executors in that amount. With the

application of that credit, the amount of any judgment which might have been entered against DePinto could not legally exceed the sum of $80,856.

(c) Any judgment entered against DePinto could not legally bear interest commencing at a date earlier than the date of the entry of judgment for the reason that the claim against DePinto herein was unliquidated.

(d) In no event could any judgment be legally entered herein against DePinto in excess of the sum of $308,000, for the reason that James E. Kelly, L. N. Kelly, Nina Dunn, J. L. Jenkins, Roslyn B. Croydon and John D. Ballantyne, who were originally charged herein with DePinto as joint tortfeasors, were, pursuant to agreements and stipulations entered into on or about March 9, 1960, and by reason of a judgment entered herein on or about June 21, 1960, released and discharged of all liability for any claims made against them and DePinto jointly, in excess of $308,000.

**Specification of Error No. 8.**

The trial Court erred in severing the claim made by plaintiff against DePinto from the claim made against Sabo, Pegram and Landoe for the reasons:

(a) It permitted plaintiff to proceed against a party secondarily liable (if at all) in the absence of parties primarily liable.

(b) It ignored appellant's cross-claim against Sabo, Pegram and Landoe.

(c) DePinto was thereby left alone in the case as "the target" defendant.

(d) It resulted in the absence of parties whose testimony would have been helpful to DePinto.

(e) Severance is not authorized where there has been a proper joinder of parties.

**Specification of Error No. 9.**

The trial Judge erred in failing to withdraw from the case after the filing of an Affidavit of Bias or Prejudice by DePinto for the reason that his failure so to do resulted in DePinto being deprived of a fair trial in violation of his rights guaranteed by the 5th Amendment to the Constitution of the United States.

**Specification of Error No. 10.**

The trial Court erred in failing to grant DePinto's Motion for Judgment (pursuant to Rule 50(b), Federal Rules of Civil Procedure), for the reasons stated in Specification of Error No. 1.

**Specification of Error No. 11.**

The trial Court erred in failing to grant DePinto's Motion for a New Trial (pursuant to Rule 59, Federal Rules of Civil Procedure), for the reasons stated in Specifications of Error Nos. 1 to 8, inclusive.

D.

## ARGUMENT

### 1. Verdict Not Supported by Evidence (Question No. 1. Specifications of Error Nos. 1 & 10.)

Although we have made numerous specifications of error, we submit that this appeal may be, and should be, disposed of by a determination that the verdict is not supported by the evidence. It is our position that: (1) the undisputed evidence discloses that any loss which may have been sustained by United as the result of its exchange of assets for stock in American was not proximately caused or contributed to by any act or omission of DePinto as a director of United, and (2) there is no competent evidence of the amount of loss or damage sustained by United, if any, as a result of the aforesaid transactions; the verdict was necessarily the result of speculation and guess upon the part of the jury.

**(a) PROXIMATE CAUSE**

By Count VI of the Doig Complaint, it is alleged that DePinto and others "caused defendant United Security Life to transfer $314,794.19 of the latter's liquid reserves to defendant American Security Investment Company in return for 30,800 shares of the latter's stock, which stock was worthless and had no fair market value". It was also alleged that DePinto and others "breached their fiduciary duty and responsibilities to defendent United Securities by permitting defendant United Security Life to enter into an agreement whereby $314,794.19 of defendant United Security Life's assets were transferred in exchange for worthless stock to the benefit of defendant James E. Kelly and L. N. Kelly." (T.R. 39-40) By Count VII of the Complaint, it is alleged that DePinto and others "acting as directors of defendant United Security Life, negligently transferred the control of defendant United Security Life to the defendants American Security Investment Company, Roslyn B. Croydon, Vernon E. Niesz, John D. Ballantyne, Edwin B. Pegram, Francis I. Sabo and Hjalmer B. Landoe who thereafter proceeded to loot the defendant United Security Life of its liquid reserves." (T.R. 40-41)

The facts are undisputed that DePinto participated in the election of Vernon E. Niesz, John D. Ballantyne, Roslyn B. Croydon, Francis I. Sabo, Edwin B. Pegram and Harry T. Goss to the board of directors of United (Ex. 5G; R.T. 215). It is also undisputed that at a meeting of the board of directors of United held at 4:15 P.M. on October 18, 1957, the resignation of Dr. DePinto as a member of the board of directors of United was accepted (R.T. 518) and, thereafter, the board adopted resolutions authorizing the purchase of 35,000 Class A common shares of American Security Investment Company, to be paid for by cash and other assets of United. (Ex. 5H) It is this transaction of which complaint is made in Counts VI and VII of the Complaint. It is clear that the evidence does not support the allegations of Count VI of the

Complaint for the reason that DePinto did not "cause" or "permit" United to transfer its assets to American. He was not a member of the board of directors of United when such transaction took place, and did not participate therein in any way, shape or form. We are, therefore, concerned only with the allegations of Count VII to the effect that DePinto and others negligently transferred control of United to the Niesz group who "proceeded to loot the defendant United Security Life of its liquid reserves."

We concede that a director of a publicly-held stock corporation occupies a fiduciary relationship to the corporation and its stockholders; that a director may be held liable to the corporation for losses to it which are the proximate result of his negligence; that lack of knowledge of, or inattention to, the affairs of the corporation, may constitute negligence. The critical fact, however, is that inattention by DePinto had no causal connection with the acts of the succeeding directors (in which DePinto did not participate and which he had no duty or power to permit or prohibit) in removing assets from United. In the case of *Barnes v. Andrews,* 298 F. 614 (D.C.S.D.N.Y. 1924), the respected Judge Learned Hand stated, commencing at page 616:

> "Therefore I cannot acquit Andrews of misprision in his office, though his integrity is unquestioned. The plaintiff must, however, go further than to show that he should have been more active in his duties. This cause of action rests upon a tort, as much though it be a tort of omission as though it had rested upon a positive act. *The plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided. * * * The defendant is not subject to the burden of proving that the loss would not have happened, whether he had done his duty or not.*" (Emphasis supplied.)

It is elementary that persons are liable as corporate directors only where they were directors at or during the time of the act or

omission relied on as creating liability. 3 *Fletcher, Encyclopedia of Corporations,* 49 et seq. §§ 994, 996, 1082. In the case of *Pritchard, et al. v. Myers,* 174 Md. 66, 197 A. 620 (1938), the Court of Appeals of Maryland said at page 624:

> "The defendant, who ceased to be a director, cannot be made liable for subsequent acts * * *."

In the case of *Angelus Securities Corp. v. Ball,* 20 C.A.2d 423, 67 P.2d 152 (1937), the Court stated, commencing at page 157:

> "* * * The record is barren of any evidence showing that either Luton or Cruickshank took any part in this transaction or received any part of the secret profit. Ordinarily, the only grounds upon which directors or other officers can be held liable for the acts of other officers are that (1) they participated therein, or (2) were negligent in supervising the corporate business, or (3) were negligent in the appointment of the wrongdoer. It need hardly be said that one cannot be held liable as director for wrongs of other corporate officers or agents after he has ceased to sustain the relation of director to the corporation. 3 Fletcher Cyc. Law of Private Corporations (perm. Ed.) pp. 481, 497, Secs. 1069, 1082. It is not claimed that defendants Luton and Cruickshank ever made any profit out of the sale by Ball of the securities in question to Harriss or shared in any way in the illegal profit alleged to have been made. Assuming that there was fraud in the transaction, if legal wrong to the company was there done, it could only be material here as to the respondents Luton and Cruickshank if they were parties to it. Not having been participants therein, either directly or indirectly, no liability, in our opinion, can be put upon them. * * *"

The case of *Minnis v. Sharpe,* 203 N.C. 110, 164 S.E. 625 (1932) is directly in point. We quote from page 625.

> "In the absence of evidence tending to show a causal connection between the negligence of the defendant, James N. Williamson, Jr., while serving as a director of the Alamance Insurance & Real Estate Company, and the loss sus-

tained by plaintiff's intestate by reason of the negligence of the directors of said company, after the defendant had ceased to be a director, it was error to refuse defendant's motion for judgment as of nonsuit at the close of all the evidence. Burke v. Carolina Coach Co., 198 N.C. 8, 150 S.E. 636; Whitaker v. Carpenter Motor Car Co., 197 N.C. 83, 147 S.E. 729; Peters v. Great Atlantic & Pacific Tea Co., 194 N.C. 172, 138 S.E. 595; Gillis v. Transit Corporation, 193 N.C. 346, 137 S.E. 153; Ledbetter v. English, 166 N.C. 125, 181 S.E. 1066."

If DePinto is to be charged with liability for the acts of the Niesz group, it can only be upon the theory that he participated in the election of the members thereof to the board of United, when he knew, or should have known, that they were persons who, by reason of past conduct, could be expected to carry on the affairs of United in a negligent or wrongful manner. Throughout the numerous trials and appeals of this case, counsel for Doig have insisted that the case of *Insuranshares Corporation v. Northern Fiscal Corporation,* 35 F. Supp. 22, 42 F. Supp. 126 (D.C. E.D. Pa. 1941) is the guidepost which leads to a finding of liability upon the part of DePinto. To the contrary, the language of Judge Kirkpatrick discloses why DePinto cannot, in this case, be held liable for the acts of the Niesz group:

> "The fault of the defendants lay in turning over control of the plaintiff corporation to a group who they knew or could by the exercise of reasonable care have known *would not be restrained by any scruples* from abstracting some half million dollars from the plaintiff's treasury to raise the sum from which to pay the defendants the purchase price of their stock. (42 F. Supp. 126)"

The record herein discloses no evidence whatsoever which suggests that, had DePinto made an investigation, he would have discovered that any member of the Niesz group was unscrupulous or other than a reputable and respected business or profes-

sional man. The language of the Court, in the case of *Benson v. Braun,* 155 N.Y.S.2d 622 (1956), at page 262, is apposite:

> "On this phase of their case, plaintiffs have failed to establish that the individual defendants sold to persons who they *knew* 'had previously looted' the corporation and who 'had otherwise breached their trust while directors'. The sellers could only know that which was established as a fact."

In the case of *Briggs v. Spaulding,* 141 U.S. 132, 11 S.Ct. 924, 35 L.Ed. 662, the Supreme Court of the United States affirmed a judgment of the Circuit Court dismissing a suit in equity to recover loss and damage sustained by a bank as a result of neglect of duty of the directors. The bank, being then insolvent, suspended business on April 14, 1882. The defendants Spaulding and Johnson became members of the board of directors of the bank on January 10, 1882, and they participated in the election of the former cashier, Lee, as president of the bank. Neither Johnson nor Spaulding paid any attention to the affairs of the bank. The bank was rendered insolvent by reason of Lee's discounting of the paper of persons engaged with him in outside business and speculation, who were not adequately responsible for their engagements. The Supreme Court said:

> *"Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequences of omission on their part.* (Emphasis supplied.)
>
> * * * * * * *
>
> "We pass, then, to the inquiry as to the liability of defendants Spaulding and Johnson. In what did their negligence consist, and were losses occasioned by that negligence, and what losses? Their conduct is to be judged, not by the event, but by the circumstances under which they acted.

* * * * * * *

"Were these defendants guilty of negligence in allowing Lee to remain in charge of the bank? Would they have been so guilty if they had put him in charge for the first time on the 10th of January?

* * * * * * *

"His general character was good, his reputation for integrity and financial capacity excellent, and he possessed the confidence of his fellow-citizens. Upon the 10th of January, 1882, he was the owner of two thirds of the stock of the bank, and had apparently a greater interest than any other person in seeing that its affairs were so managed that its capital would remain unimpaired. The business of the bank had been conducted for years by the president, assisted by the other executive officers, and it had seemingly been well conducted. Lee was selected to assume the management when Charles T. Coit retired in October, 1881, by the then board of directors, and there was nothing to indicate that the choice was not a proper and fit one. We think no jury would have been justified in finding defendants guilty of negligence in retaining Lee in the management of the bank."

Although the Supreme Court did not expressly predicate its opinion upon a lack of proximate cause between the inattention of Johnson and Spaulding and the loss resulting to the bank from Lee's activities, such predicate is implicit in its decision. In the case at Bar, DePinto can no more be held liable for the acts of the Niesz group than were Johnson and Spaulding held liable for the acts of Lee. There is nothing in the record to contradict the presumption* that it could be said of each member of the Niesz group that "his general character was good, his reputation for integrity and financial capacity excellent, and he possessed confidence of his fellow-citizens". The trial Judge excluded DePinto's offer to prove that the members of the Niesz group were

*31A *C.J.S. Evidence*, §§ 122, 126, 150E.

men of excellent reputation for professional ability and integrity. (R.T. 469, 477, 523) The limited evidence which the trial Judge permitted DePinto to place before the jury disclosed that Croydon, Niesz and Ballantyne were insurance men of good reputation and that the attorneys who prepared the documents and handled the closing of the transaction between United, American and Kelly on October 18, 1957, were men of ability, integrity and good reputation. (R.T. 309-310)

The case of *Michelson v. Penney,* 135 F.2d 409 (2 Cir., 1943) is most enlightening upon the question of proximate cause. The well-known J. C. Penney was sued by a depositors' committee of the City National Bank of Miami, Florida, of which Penney was chairman of the board to recover losses claimed to have been caused by his violation of duty as a director. During the three years that Penney served as a director, he attended only three out of thirty-one meetings of the board. Among other things, Penney was charged with a violation of 12 U.S.C.A. § 72, which requires every bank director to own stock in his own right. With respect to whether or not Penney's violation of the statute was the proximate cause of loss to the bank, the Court stated:

> "*Each standard of liability still requires, however, a causal connection between the act interdicted and the loss.* It is because of that requirement that we do not agree with the district court in holding defendant as an insurer by reason of the qualification of dummy directors. That there was a violation of statute seems clear. 12 U.S.C.A. § 72 requires every director of a bank such as this to 'own in his own right' shares of the bank's capital stock of which the aggregate par value shall not be less than $1,000, and provides that a director ceasing to own the required shares 'shall thereby vacate his place.' To all intents and purposes, Penney-Gwinn was the substantial owner of the stock who had supplied the money and who took the risk of loss; indeed, Penney-Gwinn ultimately paid the assessment levied on these shares of stock. But that violation of itself does not show loss to the bank.

> *It was not shown, for example, that irresponsible or untrustworthy men were placed on the Board and that they proceeded forthwith to loot the bank's exchequer. On the contrary, the evidence supports the conclusion that the directors were all known and esteemed business men.* Conceivably there may arise cases where specific losses can be traced to a violation of this statute, but that is not the present case." (Emphasis supplied.)

Appellees will, no doubt, take the position that, even though the record fails to disclose that members of the Niesz group had reputations for negligent business conduct, the circumstances surrounding the surrender of control of United to them was such as to put DePinto upon inquiry as to their intentions. We are not aware of any decisions which require that a director in the position of DePinto make an exhaustive inquiry as to the intention of the directors who succeed him. If this were so, a retiring director could participate in the election of competent and reputable men, only to be held liable for their acts committed months thereafter because of his alleged failure to ascertain their plans with respect to the conduct of the corporate business. There was nothing inherent in the proposal of Kelly to sell his stock in United and cause the control of United to be transferred to the purchasers, which would have put a reasonably prudent director upon inquiry, beyond the point of ascertaining that the new directors were not thieves or incompetents. The fact that Kelly intended to sell his stock in United would not raise any suspicion that the purchasers intended to wrongfully extract assets from United in order to pay the purchase price. When a group of investors are acquiring a large block of stock in a corporation which will give them *de facto* control thereof, there can be nothing surprising, suspicious or sinister about the fact that they desire to take over management of the corporation forthwith. As stated in *Benson v. Braun*, 155 N.Y.Supp.2d 622, 625:

> "When ownership of controlling stock changes hands, a change in the board of directors is generally expected. * * * Thus, it is legitimate for those selling controlling shares, in connection with the sale of their stock, to resign as directors and to use their influence to bring about resignations by a majority of the board so as to facilitate the taking over of control by the purchasers."

**(b) DAMAGES**

It is undisputed that, on October 18, 1957, there were transferred from United to American assets having a face value of $308,000, for which United received 30,800 shares of the common stock of American. Upon said date, United also transferred to American cash in the amount of $6,794.19. (R.T. 212-215) Included in said assets were two mortgages, executed by individuals, having an aggregate face value, including interest, of $44,298.47. There were also promissory notes of United Finance Corporation in the face amount of $86,000. In his instructions to the jury, the trial Court stated:

> "In your computation of damages, the value if any, you find of the American Security Investment Company stock received by United Security Life, as disclosed by the evidence, should be deducted from your findings as to the amount of the value of the assets transferred to Kelly." (R.T. 587)

In the light of the verdict, the jury presumably determined that the assets were worth $314,794.19, and that the 30,800 shares of American stock received by United were valueless.

Not only was there no competent evidence that United's assets were worth $314,794.19, but the only evidence bearing on the question discloses that such assets were *not* worth that amount. Included in the list of assets were promissory notes of United Finance Corporation in the principal amount of $86,000, with accrued interest of $1,626.88, a mortgage of H. N. McKinley in the principal amount of $31,851.21, with accrued interest in

the amount of $1,572.91, and a mortgage of Forrest R. Newville in the principal amount of $10,816.67, with accrued interest in the amount of $57.68. (R.T. 212) In the agreement between American and Kelly (Ex. 58), these items, aggregating $131,-925.35, were described as:

> "(c) Existing notes and mortgages *owed* by Kelly in the amount of $131,925.35."

Obviously, the obligations of McKinley, Newville and United Finance Corporation were, in reality, the obligations of Kelly, which he was willing to accept at face value, but which would have been of questionable value in the hands of anyone else. As pointed out by Croydon, 38% of the stock of United had a value of $405,000, "If you could pay for it—partially pay for it with accounts receivable. In other words, with what I would term *questionable assets.*" (R.T. 375) That the assets were "questionable" is borne out by the testimony of Guy Hammet, Examiner for the Arizona Insurance Department. He testified that, on October 17, 1957, there was a deficit in the capital stock and surplus of United. (R.T. 263, 266) "That was because $86,000 in non-admitted assets were advanced to United Finance." (R.T. 268)

Appellees will, no doubt, argue that the assets transferred to American by United had a value of $314,794.19, because the books of United showed a deficit in surplus as of December 31, 1957, of $351,844.56, and Hammett testified that such deficit was the result of the transfer of $308,000 of United assets on October 18, 1957. (R.T. 264-265) The conclusion sought by Appellees does not follow from Hammett's testimony, for the reasons:

1. The book value of the assets did not necessarily reflect the actual or market value.

2. According to Hammett, the removal of the $86,000 United Finance Corporation notes on October 18, 1957, could not have caused an impairment—such notes were not admitted assets and,

as a result thereof, United was already in a deficit condition on October 17, 1957. (R.T. 268, 272)

3. Hammett was not able to state the amount of impairment on October 17, 1957, as compared with the impairment on December 31, 1957. (R.T. 272)

In order to follow the Court's instructions, the jury was required to make a guess as to the value of the United assets transferred to American and then deduct therefrom the value of the 30,800 shares of American stock received in exchange. On the basis of the record, it would have been an utter impossibility for the jury to have arrived at a value of the American stock. As a result of the three-way transaction on October 18, 1957, American held approximately 38,000 shares of United stock, having a value of $7 per share, or $266,000. (R.T. 379) Furthermore, the American stock had a value based upon the management contracts which it owned. (R.T. 364) With this meager testimony, the jury was left groping in the dark as to the value of the American stock, but, needless to say, the jury was not justified in determining that the stock had no value whatsoever.

Plaintiff had the burden of proving the amount of damage which was sustained by United, if any, as a result of the transaction of October 18, 1957. It would have been relatively simple to have had some competent person make an appraisal of the assets transferred to American (and then to Kelly) and an appraisal of the 30,800 shares of American stock received by United. This was not done. Plaintiff elected to base his case upon pure conjecture. It is elementary that verdicts must have a more substantial basis than mere surmise, supposition, speculation, suspicion or conjecture. *U. S. Smelting etc. Co. v. Wallapai Mining Development Co.*, 27 Ariz. 126, 230 P. 1109; *Salt River Valley Water User's Association v. Blake*. 53 Ariz. 498, 90 P.2d 1004; *City of Tucson v. Apache Motors*, 74 Ariz. 98, 254 P.2d 255.

It is respectfully submitted that the verdict rendered in the lower Court has no support in the evidence and that the judgment of the lower Court must be reversed with instructions to enter judgment in favor of DePinto.

**2. Errors in Admission of Evidence (Question No. 3. Specifications of Error Nos. 2 & 11.)**

**(a) FACTS AND CIRCUMSTANCES UNRELATED TO TRANSACTION OF OCTOBER 18, 1957**

Over the strenuous objection of DePinto, the trial Court permitted plaintiff to introduce evidence of facts and circumstances, particularly the conduct of DePinto, having no relationship whatsoever to the transaction of October 18, 1957. For example: DePinto served as a member of the Board of Directors of Life Underwriter's, Inc. He was mentioned in a prospectus issued by that company for the sale of its stock to the public. (R.T. 181) DePinto attended a meeting of the United directors and shareholders on March 29, 1955. The meeting was called by Kelly to hear the complaints of one James Burke, to the effect that the company was not being administered properly. One Dr. Harry Cummings appeared at the meeting and complained about the management of United. (R.T. 186-187, 194-197; Ex. 4B) Minutes of a meeting of the Board of Directors of United held on November 15, 1955, indicated that DePinto attended said meeting when, as a matter of fact, he was not present. (R.T. 201-202) Minutes of a meeting of the Board of Directors of United held on February 19, 1957 state that DePinto was present, in person, when, as a matter of fact, he did not attend such meeting. (R.T. 203-204) DePinto did not attend a meeting of the Board of Directors of United held on June 22, 1956. (R.T. 205) DePinto thought that Kelly was president of United up to October 18, 1957. During his tenure as a member of the Board of Directors of United, DePinto did not make a telephone call to United's

office to obtain information concerning United's financial condition, did not call at United's offices and did not examine the report of the Director of Insurance prepared for United for the year ending June, 1956. It was DePinto's impression that United earned a profit for the year 1955, whereas it actually sustained a loss. DePinto did not know who were the officers of United from July 18, 1956 to October 18, 1957. DePinto never wrote a letter or sent a notice of any kind to the shareholders of United that he did not intend to actively participate as a director of United. (R.T. 208-209)

In view of the fact that the only issue in this case was the question of whether or not the transfer of assets from United to American on October 18, 1957 was proximately caused by negligence of DePinto in participating in the election of the Niesz group to the Board of Directors of United, it becomes obvious that the only purpose that could be served by all of the extraneous and immaterial evidence above-mentioned would be to prejudice DePinto in the eyes of the jury. DePinto's liability or non-liability for the transaction of October 18, 1957 does not in any way depend upon his acts or omissions as a member of the Board of Directors of United prior to October 18, 1957. In the case of *Consolidated National Bank v. Giroux,* 18 Ariz. 253, 158 P. 451, the Supreme Court of Arizona held that, in an action for breach of contract of sale in refusing to accept delivery of cattle, evidence that the defendant, with the consent of plaintiff, deducted $3,000 from the purchase price of a previous shipment under the same contract was inadmissible and prejudicial as creating an improper inference that the defendant wrongfully took advantage of plaintiff in another transaction not involved in the action. Among other things, the Supreme Court of Arizona stated:

> "How this transaction may have been played before the jury by counsel for appellees in their argument may be

> easily imagined, and that it would tend to excite their prejudice is most certain."

In the case at Bar, the prejudicial effect of the above-mentioned testimony was aggravated by the trial Court's instructions to the jury. The jury was advised that failure of a director to attend director's meetings, failure to examine minutes and documents subject to a director's approval and failure to make reasonable inquiry as to important transactions of the corporation could be considered as negligence. (R.T. 578) In other words, the Court, in effect, permitted DePinto to be "convicted" by reason of the fact that he failed to attend directors' meetings, failed to examine minutes and documents and failed to inquire as to transactions of the corporation, even though such dereliction had nothing whatsoever to do with the transaction of October 18, 1957.

**(b) EVIDENCE RE DAMAGES**

The trial Court, over the objection of DePinto, allowed the introduction in evidence of page 61 of Exhibit 16, being a report of an examination of the affairs of United made by Guly L. Hammett, an examiner for the Insurance Department of the State of Arizona, during the year 1958. The report was inadmissible as being pure hearsay. The report was not admissible as an official document. In the case of *Olender v. United States*, 210 F.2d 795 (9 Cir. 1954) this Court stated:

> "Thus, this circuit and most of the other circuits which have passed on the question have held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleaned second-hand from random sources must be excluded."

Over the strenuous objection of DePinto, the trial Court permitted the introduction into evidence of Exhibit No. 83 (Kelly's

1957 federal income tax return), and former testimony of Mr. Kelly with respect to the preparation of the return by Mr. Frank Campbell. (R.T. 329-330) The income tax return is pure and unadulterated hearsay. Apparently, the income tax return was admitted upon the theory that it constituted proof of the reasonable value of the assets which were removed from United on October 18, 1957, and found their way into the hands of Kelly. Unfortunately DePinto had no opportunity to cross-examine with respect to the contents of said return. The Court will recall that the agreement between American Security Investment Company and Kelly of October 18, 1957 (Ex. 58), provided that, as consideration for his stock, Kelly would receive cash in the amount of $176,840.95, bonds of the value of $16,370.18, and "existing notes and mortgages *owed* by Kelly in the amount of $131,-925.35." The last item, necessarily, referred to the two first mortgage notes and the three notes of United Finance Corporation, which are listed in the minutes of the meetings of the boards of directors of United and American on October 18, 1957. (Exs. 5H & 50N) It is apparent that the mortgage notes and the notes of United Finance Corporation (which, in reality, were obligations of Kelly) would not have had the same value in the hands of a stranger as they would have in the hands of Kelly. Needless to say, DePinto was substantially prejudiced by the admission of such incompetent evidence.

Over the objection of DePinto, the witness Hammett was permitted to testify with respect to the financial condition of United on October 17, 1957, its condition on December 13, 1957, and to give an opinion as to the effect of the transfer of assets from United to American on October 18, 1957. All of such testimony was inadmissible for the reason that it was hearsay and not supported by a proper foundation. (R.T. 262-263)

### 3. Errors in the Rejection of Evidence (Question No. 4. Specifications of Error Nos. 3 & 11.)

#### (a) PLANS OF NIESZ GROUP; CONSULTATION WITH LAWYERS AND PUBLIC OFFICIALS

The Trial Court rejected the testimony of Kelly which disclosed:

Kelly's initial conversations with Niesz, Ballantyne and Croydon relative to the sale of his stock. The plans of the Niesz group with respect to the use of United funds for the purchase of stock accompanied by a plan to secure mortgages to be placed in either United or American to the end that the surplus of United would not be impaired. The approval of the plan by Earl Glenn of the law firm of Jennings, Strouss, Salmon & Trask. Consultations of Niesz, Tompane, Croydon and Heineman with the Insurance Division and Securities Division of the Corporation Commission of the State of Arizona. Discussion of the proposed plan at the office of Jennings, Strouss, Salmon & Trask on October 18, 1957, at which time there were present Croydon, Ballantyne, Niesz, Kelly, Bretz and Dunn, and attorneys Campbell, Salmon, Glenn, Heineman and Goss. Discussions of Kelly with the State Insurance Commissioner with respect to the proposed plan. Information received by Kelly that mortgages would be forthcoming through Mr. Tompane of Phoenix Title and Trust Company for the purpose of backing up American stock. (O.T. 442-555, R.T. 294-324).

The Trial Court rejected testimony of Croydon with respect to the following facts and circumstances:

The plans of the Niesz group as outlined in the telegram from Croydon to Landoe of October 14, 1957. The origin of the plan for the purchase of Kelly's stock in part with the assets of United. Croydon's valuation of the Kelly stock. Croydon's efforts to sell Kelly's stock to Insurance Corporation of America. Croydon's discussions with the Director of Insurance, George Bushnell. Croydon's discussions with Eugene Tompane relative to the ac-

quisition of mortgages. Croydon's statement that the notes of United Finance Company in the amount of $86,000.00 were not admitted assets. Croydon's understanding that at the time of the meeting on October 18, 1957, in the office of Jennings, Strouss, Salmon & Trask, he had a commitment from Eugene Tompane with respect to the mortgages. (O.T. 927-1025, R.T. 334-379).

The Trial Court excluded all of the testimony of the witness Eugene Tompane with respect to his conferences with Niesz, Croydon and Ballantyne and with Mr. Toll the Director of Securities of the Arizona Corporation Commission; his telephone conversation with Mr. Bushnell, the Director of Insurance, and his advice to Niesz and Ballantyne that he thought mortgages could be made available. (R.T. 397-408).

The Trial Court rejected all of the testimony of the witness Niesz which disclosed:

The efforts of the Niesz group to work out a plan for the purchase of the Kelly stock by American which would in all respects comply with the law and not result in any damage to United. The Niesz group were guided by competent attorneys and discussed the proposed plan for acquiring Kelly's stock with the Insurance Commissioner of the State of Arizona and the Director of the Securities Division of the Corporation Commission of the State of Arizona. Dr. Sabo invested $115,000.00 in American—$52,000.00 on October 18, 1957, $23,000.00 on October 28, 1957, and approximately $40,000.00 which was used to purchase the Statewide Benefit Insurance Company. (O.T. 600-738; R.T. 484-542).

The Trial Court rejected the testimony of Dr. Sabo which disclosed that he made an investment of $115,000.00 in American and that he and his associates had no intention to loot United of its liquid assets in order to pay Kelly for his stock. (O.T. 832-869; R.T. 356, 489-492).

The Trial Court excluded all of the testimony of the witness Gregory which disclosed:

After the merger of United with Provident Security Life Insurance Company the latter company secured, by means of Certificates of Contribution, mortgages having a value of over $200,000.00 which were then carried on the books of Provident as assets and part of its surplus. The forms of Certificates of Contribution are supplied by the office of the Insurance Director. (R.T. 527-537).

The Trial Court also excluded testimony of the witness Landoe disclosing that Dr. Sabo invested $115,000.00 in American. (R.T. 543).

The Trial Court rejected DePinto's offer to read into evidence "Admitted Facts" contained in the Pre-Trial Order and numbered 113 to 116, 121 to 160 and 171 to 189. (T.R. 103-112; R.T. 518-520). These "Admitted Facts" disclose:

Pegram's background as a Bozeman, Montana business man and associate of Dr. Sabo. Landoe's background as a Bozeman, Montana lawyer who had represented Dr. Sabo on numerous occasions. The conferences of Landoe and Pegram with Croydon, Ballantyne and Niesz in Phoenix about September 10, 1957 relative to the organization of a holding company to acquire and manage life insurance companies. Pegram and Landoe's discussions with attorney, Harry Goss and Eugene Tompane, of Phoenix Title and Trust Company with respect to the reputation, financial responsibility and experience of Croydon, Niesz and Ballantyne. The meeting of Landoe, Pegram and Sabo with Croydon, Niesz and Ballantyne on or about September 27, 1957, at which time it was agreed to form American with Harry Goss acting as the attorney. Dr. Sabo's agreement to invest $115,000.00 in American. Dr. Sabo's transmittal of $52,000.00 to American on October 18, 1957.

The "Admitted Facts" contained in the Pre-trial Order together with the proffered testimony of the witnesses hereinabove men-

tioned give a substantially complete picture of the activities of the Niesz group on and prior to October 18, 1957 with respect to the formation of American and its acquisition of the Kelly stock. If DePinto can be held liable in this action it can only be on the basis of the allegations of Count VII of Plaintiff's Complaint to the effect that he negligently transferred the control of United to the Niesz group "who thereafter proceeded to loot the defendant, United Security Life of its liquid reserves". The evidence which was excluded by the Trial Court discloses that the Niesz group did not loot United and had no intention of looting it. It discloses that each member of the Niesz group was acting pursuant to the advice of counsel, that the Director of Insurance and the Director of the Securities Division of the Corporation Commission had been consulted, that the group mistakenly, but in good faith thought that their plan could be implemented by mortgages furnished through Eugene Tompane pursuant to Certificates of Contribution which had approval of the Director of Insurance and that Dr. Sabo was making a very substantial investment in the program namely, $115,000.00. It is extremely significant that the plan for the obtaining of mortgages to augment the surplus of United was not an impractical scheme. When United was merged with Provident the latter company secured, by means of Certificates of Contribution, mortgages having a value of over $200,000.00 which were then carried on the books of Provident as assets and part of its surplus.

If Dr. DePinto—or a hypothetical prudent director—had made an investigation of the facts and circumstances surrounding the transaction of October 18, 1957 he would presumably have learned of the facts above-mentioned and which were withheld from the jury. How could the jury make a determination that DePinto's failure to investigate all of the details of Kelly's proposed sale of stock was or was not a proximate cause of loss to United without knowledge of all of the facts and circumstances

that any such investigation would have revealed? It was for the jury to make such judgment based upon a view of the complete picture. With the whole picture before it, the jury might well have concluded that a prudent director would not have refrained from participating in the election of the Niesz group to the Board of Directors of United. The bulk of the testimony which was excluded by the Trial Court was testimony adduced at the initial trial. After hearing all of such testimony the jury which sat at the first trial returned a verdict in favor of DePinto. That jury found specifically that DePinto was not "negligent as a director of United Security Life in one or more particulars proximately causing or contributing to loss or damage to said corporation with respect of transfer of the assets in question." (O.T. 305).

**(b) REPUTATION OF NIESZ GROUP**

The Trial Court consistently rejected testimony with respect to the reputation of various members of the Niesz group for integrity and business ability, including the testimony of witnesses Kelly, (R.T. 306) Johnson, (R.T. 467-469) Goss, (R.T. 477) and Gary (R.T. 522-524). It is the position of DePinto that if he participated in the election of reputable business and professional men to the Board of Directors of United he could not under any circumstances be held liable for their subsequent conduct. In any event, for the purpose of appraising DePinto's conduct and its relationship to the transaction of October 18, 1957, the jury was entitled to know just what DePinto would have learned had he made an investigation of the antecedents of the Niesz group. If the jury had received affirmative evidence of the fact that DePinto had not participated in the election to the Board of Directors of United of crooks, thieves or incompetents (persons who might be expected to "loot" United) they no doubt would have exonerated DePinto from any and all liability for the acts of the Niesz group.

**(c) EVIDENCE AS TO DAMAGES**

The transaction of October 18, 1957 did not cause any loss or damage to United except to the extent that the value of the assets transferred to American exceeded the value of the 30,800 shares of American stock which United received in return. (Note instruction of Trial Court. R.T. 587-588). Under the circumstances plaintiff was clearly entitled to introduce any evidence bearing upon the value of the American stock. This would include testimony with respect to the investment which had been made in American by the stockholders thereof and also testimony with respect to the value of United stock which was acquired by American from Kelly and United Family Guild.

The Trial Court, nevertheless, rejected "Admitted Fact" numbered 188 disclosing that Dr. Sabo transmitted $52,000.00 to American on October 18, 1957. The Trial Court excluded testimony of the witness Kelly bearing upon the value of United stock. (O.T. 498, 553-555; R.T. 316-317, 324). Testimony of the witness Croydon bearing upon the value of United stock was excluded. (O.T. 958-974, 1012-1013, 1023-1025; R.T. 355-362, 376, 379). The Trial Court rejected the testimony of the witnesses Sabo, Niesz and Landoe with respect to the $115,000.00 investment which was made in American by Sabo. (O.T. 736-738, 832, 856, 869, 1094-1095; R.T. 356, 489-492, 542-543). The trial Court excluded testimony of the witness Hammett bearing upon the value of United stock. (O.T. 1060-1063; R.T. 544). The testimony of Hammett which was excluded included the statements with respect to the value of the 38,000 shares of United stock acquired by American:

> "Q. In short, your valuation had nothing to do with the going price of this stock, did it?
>
> "A. Not the going price, no sir.
>
> "Q. It was simply a computed formula set forth in the Insurance Code?
>
> "A. Not even that."

**4. Errors in Charge to Jury. (Question No. 5. Specifications of Error Nos. 4 & 11.)**

The trial Court instructed the jury:

> "The particular acts or omissions on the part of the defendant DePinto, which plaintiffs allege occurred and amounted to negligence or breach of fiduciary duty are as follows: Acceptance of the office of director without intending to discharge the duties and responsibilities of director; delegating or relinquishing his responsibilities as a director to Kelly; failing to attend directors' meetings; failure to examine minutes, records and transactions and documents of the corporation; failure to keep himself advised by reasonable inquiry as to important transactions of the corporation." (R.T. 570)
>
> * * * * * * *
>
> "'* * * However, any of the following acts or omissions, if determined by the jury to have resulted from a failure to exercise reasonable care, may be found to constitute negligence and breach of fiduciary duty chargeable to a director, failure to attend directors' meetings, failure to examine minutes and transaction documents subject to a director's approval, failure to make reasonable inquiry as to important transactions of the corporation, and failure to act with respect of conditions and transactions potentially harmful to the corporation and its stockholders when such are brought to the director's attention, or of which he should have learned as a director exercising reasonable care.'" (R.T. 578)

DePinto objected to the foregoing instructions (R.T. 598-599), for the reason that the jury was thereby invited to find that DePinto was guilty of negligence with respect to acts or omissions which had nothing to do with the transaction of October 18, 1957. There was no evidence introduced to support the allegation of Count VI, that DePinto caused or permitted United to transfer certain of its assets to American. If there were any issue which the Court might properly (which we deny) have submitted to

the jury, it was the issue raised by the allegations of Count VII, to the effect that DePinto negligently transferred control of United to the Niesz group, who, thereafter, proceeded to loot United of its liquid reserves.

Contrary to the above-quoted instructions of the trial Court, plaintiff did not allege that the acts or omissions on the part of DePinto, amounting to negligence or breach of duty, were "acceptance of the office of director without intending to discharge the duties and responsibilities of director; delegating or relinquishing his responsibility as a director to Kelly; failure to attend directors' meetings; failure to examine minutes, records and transactions and documents, etc., etc." The instruction is a complete misstatement of plaintiff's claim, and obviously, DePinto was substantially prejudiced when the trial Court instructed the jury that it could find DePinto guilty of negligence in failing to attend directors' meetings, failure to examine minutes, etc. In the light of the evidence with respect to DePinto's conduct as a director of United, the Court's instruction was practically a command that the jury find him guilty of negligence. In this case, we are concerned with the conduct of DePinto in relation to the transaction of October 18, 1957. His only relationship with that transaction was his participation in the appointment of the Niesz group to the board of directors of United. Every act or omission of DePinto prior to that time had no bearing whatsoever upon the question of whether or not the transfer of assets from United to American was proximately caused or contributed to by DePinto's participation in the election of the Niesz group as members of the board of directors of United. If DePinto had been the most conscientious and persevering of corporate directors prior to October 17, 1957, such fact would have had no more relevancy to the transactions of October 18, 1957, than the fact that he was apparently something less than a model director prior to that date.

The Court further instructed the jury as follows:

"The law does not permit a director of a corporation to remain silent and inactive when he knows, or in the exercise of reasonable care by him, he should know, that an illegal transaction, or one potentially harmful to the corporation is being attempted by officers or other directors of the corporation.

* * * * * * *

"If by negligent acquiescence, a director permits corporate assets to be diverted or transferred to the loss of the corporation, such director is liable to the corporation for damages proximately resulting therefrom." (R.T. 579)

Defendant objected to this instruction (R.T. 599), for the reason that it has no application to the facts in this case. The instruction could only be applicable in a situation where a director is sought to be held liable for the acts of other directors which have taken place while he is a member of the board. It is fairly obvious that the instruction was prepared by plaintiff's counsel with the thought that it would be applicable to the defendant Duhame, who remained on the board of directors for some months following October 18, 1957. DePinto could not "acquiesce" in the acts of directors who succeeded him on the board of United. Furthermore, the instruction invites the jury to find that DePinto should not have remained "silent and inactive, when he knew or in the exercise of reasonable care should have known, that an illegal transaction was being attempted by officers or other directors of the corporation." The instruction is highly prejudicial to defendant for the reason that there is not a scintilla of evidence that he knew that the Niesz group intended to perpetrate an illegal transaction, nor is there any evidence whatsoever to support the conclusion that he was aware of any suspicious circumstances which would have required an investigation on his part. He knew that a group of business and professional men were purchasing Kelly's stock and that they were taking control of

United. These facts certainly did not point to the probability of skullduggery or chicanery.

The Supreme Court of Arizona has, on numerous occasions, held that it is reversible error for the trial Court to instruct the jury with respect to the law applicable to a state of facts, which is not supported by the evidence. *Butane Corp. v. Kirby,* 66 Ariz. 272, 187 P.2d 325; *Alires v. Southern Pacific Co.,* 93 Ariz. 97, 378 P.2d 913. To paraphrase the Supreme Court of Arizona, the mere submission of the instruction constituted a direction by the Court to the jury that there was a state of facts to which the instruction applied—facts from which negligence of DePinto (proximately causing damage to United) could be found as a matter of law. (378 P.2d 917)

The Court charged that "a director who delegates his duties to officers or employees of the corporation, or to other directors and negligently fails to take part in the management of the corporation, is liable for misconduct of those to whom he delegated his responsibilities. * * *" (R.T. 581) Defendant objected to the instruction (R.T. 600), for the reason that, here again, the instruction has no application whatsoever to the relevant facts in this case. Plaintiff is attempting to hold defendant liable for the acts of the Niesz group—the United directors who succeeded DePinto. DePinto did not make any delegation of his authority to the Niesz group. He participated in their election to the board of directors and resigned. The Niesz group secured their authority to act from United by reason of their being members of the board of directors, not by reason of any authority of DePinto (he then had none), which was delegated to them. Any juror listening to the charge would unquestionably conclude that the Court was instructing him that DePinto had delegated his authority as a director to the Niesz group and that DePinto was, therefore, responsible for the conduct of the Niesz group.

The Court instructed the jury that a director of a corporation may resign from office, but that a resignation specified therein to take effect upon acceptance does not become effective until it becomes accepted. Defendant objected to the instruction (R.T. 600), for the reason that the instruction assumes that there is some issue with respect to defendant's resignation. After listening to the instruction, the jury might well have concluded that defendant's resignation from the board of directors of United never became effective. The "Admitted Facts" contained in the Pretrial Order state (T.R. 100; R.T. 518), "at a meeting of United's Board of Directors on October 18, 1957, at about 4:15 P.M., defendant DePinto's resignation as a member of United's board of directors was accepted". Here, we have the Court instructing the jury as to the law applicable to a state of facts which is not only wholly unsupported by the evidence, but is flatly contrary to the evidence.

The Court gave the following instruction:

> "The fact that a director was not personally present at a particular directors' meeting at which a transaction later in controversy was approved will not in itself relieve the absent director from a director's responsibility for such transaction.
>
> "In this connection you are instructed:
>
> "1. The absent director received prior notice of the meeting as prescribed in the corporate bylaws and practice, or approved a waiver of such notice, he will be held responsible for corporate action taken at the meeting unless within a reasonable time after the meeting, he takes reasonably adequate steps to have his objection and dissent to such action specifically recorded in the minute records of the corporation.
>
> "2. If an absent director did not receive or waive notice of such meeting, but he actually knew, or by the exercise of reasonable care should have known, of corporate approval of a contested transaction, and thereafter the director failed to take reasonably prompt steps

to protest the corporate action and record his objections and dissent thereto in the minute records of the corporation, the absent director would have a director's responsibility for the contested transaction even though he did not attend the meeting, or in the latter instance, waived notice thereof; that is, if he had known of the transactions being conducted at a purported meeting, a special meeting of directors of the corporation held without notice of the meeting as prescribed by corporate laws or waiver thereof by some directors is illegal, and corporate action taken at such meeting is invalid unless afterward ratified. Corporate action taken by some directors at such a meeting thereafter may be ratified by the absent directors at a later legal meeting, or by subsequent corporate transactions pursuant to action taken at the meeting, which is known to and approved by the absent directors.

"While a resolution at a special directors' meeting at which some directors did not have timely notices is invalid, if a director does not object to such resolution or action taken pursuant thereto within a reasonable time after he has, or in the exercise of reasonable care should have, acquired knowledge of corporate action taken pursuant to such resolution, the director's failure to object to such corporate action may be found to be ratification of such director of the resolution taken at the meeting otherwise invalid as to him." (R.T. 583-584)

DePinto objected to this instruction (R.T. 601) for the reason that we, again, have the Court instructing the jury as to the law applicable to a state of facts involving the defendant Duhame, but in no way involving the defendant DePinto. The jury could not have construed the instruction to have application to a meeting of the board of directors of United other than the meeting held at 4:15 P.M. on October 18, 1957, at which the first order of business was acceptance of the resignation of DePinto. (Ex. 5H) The only corporate action which was taken at a directors' meeting of United and for which it is attempted to hold DePinto

liable was the aforesaid meeting at 4:15 P.M. on October 18, 1957. The instruction is applicable to an "absent director". DePinto was absent from the meeting, but he was not a director. He was not in a position to object to any action taken at that meeting, nor was he in a position to ratify the action taken at that meeting.

The instruction could have meant just this to the jury—DePinto was a director at the time of the meeting, he was absent from the meeting, he did not object to, or protest, the action taken at the meeting, he ratified the action taken at the meeting, he is legally responsible for all action taken at the meeting.

**5. Errors in Failing to Charge Jury as Requested. (Question No. 6. Specifications of Error Nos. 5 & 11.)**

The trial Court refused to give DePinto's Requested Instruction No. 4 (T.R. 82) to the effect that, even though DePinto might be deemed negligent in not making an investigation of the backgrounds and reputations of the Niesz group, the jury should, nevertheless, render a verdict for DePinto, unless it further found that the backgrounds and reputations of such men would justify the conclusion that, in all likelihood, they would conduct the affairs of United in a wrongful, irregular or negligent manner. This instruction would have placed squarely before the jury the question of proximate cause as announced in *Restatement of the Law,* Torts 2d, ¶ 448, and also in *Salt River Valley Water Users' Association v. Cornum,* 49 Ariz. 1, 63 P.2d 639. DePinto was entitled to have the jury informed of the legal principals, which, as applied to the facts in this case, would require the jury to conclude that the acts of the Niesz group in transferring assets from United to American was a superseding cause of harm to United which relieved DePinto of any responsibility therefor. The prejudice to DePinto from the failure of the trial Court to give the charge requested is obvious.

The trial Court failed to give that portion of DePinto's Requested Instruction No. 5, reading:

> "And the burden is upon the plaintiff of proving that the performance of the defendant DePinto's duties as a director of United Security Life would have avoided loss and what loss it would have avoided. In order to be entitled to a verdict at your hands the defendant DePinto is not subject to the burden of proving that loss, if any, to United Security Life could have happened whether he had done his duty or not."

This is a rescript of language used by Judge Learned Hand in the case of *Barnes v. Andrews,* 298, F. 614 (D.C.S.D.N.Y. 1924). It is clearly a statement of the law which is applicable to the evidence in this case. Defendant was entitled to have the jury so instructed.

In instructing with respect to proximate cause, the trial Court failed to give portions of DePinto's Requested Instruction No. 8, particularly:

> "If the negligence does nothing more than furnish a condition by which the loss is made possible, and that condition causes a loss by the subsequent independent actions of third persons, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. * * * If the acts of third persons, which is the immediate cause of loss, such as in the exercise of reasonable diligence would not be anticipated, and the third persons are not under the control of the one guilty of the first act or omission, the connection is broken and the first act or omission is not the proximate cause of the loss."

Defendant's Requested Instruction No. 8 was taken almost verbatim from *Salt River Valley Water Users' Ass'n. v. Cornum,* 49 Ariz. 1, 63 P.2d 639 (Ariz. 1936). Its applicability to the case at Bar is demonstrated by the fact that DePinto was charged with creating a condition which made it possible for the Niesz group to carry out their plan of transferring certain of United's assets

to American. Proximate cause is not a matter that is clearly and completely understood by all lawyers and judges, much less laymen sitting on a jury. When the matter of proximate cause is explained to a jury, the party defendant is certainly entitled to have the matter explained to the jury as fully, completely and clearly as possible. There was no reasonable justification for the Court to withhold from the jury portions of DePinto's Requested Instruction No. 8, which is, obviously, the law in the State of Arizona.

**6. Errors with Respect to Deliberations of Jury. (Question No. 7. Specifications of Error Nos. 6 & 11.)**

The minute entries of the trial Court disclose that the jury retired to consider its verdict at 1:47 P.M. on June 16, 1965. A verdict was returned at 11:55 P.M. on that date. (T.R. 292-293) The minutes of June 16 also disclose:

> "At 12:02 A.M. the jury is discharged from the further consideration of this case and excused subject to call. It is ordered that the communications from the jury and responses, marked No. 1 and No. 2, be filed by the Clerk and that the record show the responses were taken up with counsel and are proper; and that communication from the jury marked No. 3 be filed." (T.R. 236)

At about 6:00 P.M., the jury sent the following communication to the trial Judge:

> "1. Jury wishes a repeat of the 3 factors to be used in judging for the plaintiff.
>
> "2. The verdict lists the defendants as:
>
> Provident Life Ins. Co.,
>
> Angus J. DePinto, et al,
>
> "Our impression from the trial is that Dr. DePinto was the only defendant. Please clarify." (T.R. 237)

The reply of the trial Judge appears as follows:

> "Answering your First inquiry:

The three (3) ultimate issues are:

1) Was defendant DePinto negligent in performing his fiduciary duties in one or more of the particulars asserted by plaintiffs?

If so,

2) Did such negligence of defendant DePinto proximately cause or contribute to causing loss or damage to United Security Life?

If so,

3) What was the amount of such loss or damage?

"The three items of claimed damage are:

| | |
|---|---|
| 1) Cash, by check or bank certificates of deposit— | $166,498.66 |
| 2) Promissory notes and accrued interest thereon— | 87,626.88 |
| 3) Mortgages, bonds and accrued interest thereon— | 60,668.65 |
| Total | $314,794.19 |

"Answering your Second inquiry:

There are other defendants in the case, but the present trial is concerned only with the liability of defendant DePinto."

(T.R. 238)

We submit that it was an egregious error on the part of the trial Judge to advise the jury with respect to "the three items of claimed damage", and then to total such items in the amount of $314,794.19. Nowhere in the evidence is there any reference to "the three items of claimed damage". The jury did not seek information with respect to the items of claimed damage. They asked for a "repeat of the three factors to be used in judging for the plaintiff." The most prejudicial thing about the trial Court's note to the jury was the fact that it practically invited them to render a judgment against DePinto in the amount placed before

them in black and white—$314,794.19—and to completely ignore the instructions of the Court that:

> "If your computation of damages, the value, if any, you find of the American Security Investment Company stock received by United Security Life, as disclosed by the evidence, should be deducted from your findings as to the amount of the value of the assets transferred to Kelly."

(R.T. 588)

The applicable rule with respect to the trial Court's communications to the jury after it has retired to consider its verdict is found in the case of *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 63 L.Ed. 853, 39 S.Ct. 435, wherein the Supreme Court of the United States said:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordinary circumstances, and wherever practicable, the jury ought to be recalled to the court room, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all procedings in the trial will be had.

We do not deny that the Court's responses to the jury's questions were "taken up with counsel". Unfortunately, the record does not disclose the scope of that communication. But, whether or not there was a lack of communication between the trial Court and the attorneys for DePinto is beside the point. The funda-

mental question is whether or not a party litigant is to be saddled with a judgment in excess of $300,000, which was based upon the verdict of a jury which, quite probably, would not have been rendered in the absence of an erroneous communication from the trial Court. In the case of *Michie v. Calhoun,* 85 Ariz. 270, 336 P.2d 370, the Supreme Court of the State of Arizona took cognizance of erroneous instructions given to the jury by the trial Court notwithstanding the absence of a proper objection. We respectfully submit that the record in this case discloses that DePinto was deprived of the fair and impartial consideration of the jury based upon a clear understanding of the damages (if any) sustained by United, namely the value of the assets transferred from United to American, *less the value of the American stock received by United.*

**7. Judgment Excessive. (Question No. 8. Specifications of Error Nos. 7 & 11.)**

**(a) CANCELLATION OF STOCK**

Under the terms of the merger agreement entered into between United and Provident, on or about February 7, 1959, it was provided that any recovery in this action would be shared by each former owner of United stock in the proportion that the number of shares held by him bore to the total shares issued and outstanding. This was spelled out in the "Certificates of Contingent Interest" issued pursuant to the merger agreement. (Ex. G)

Pursuant to the merger agreement, the 38,798 shares of United stock held by American were cancelled and all rights therein were relinquished and released. (T.R. 132) Pursuant to the settlement made with the Duhame Estate, which was made with the approval of the trial Court, the Duhame Estate released and surrendered the right to participate in any recovery herein to the extent of 3,750 shares of stock. (T.R. 267) By reason of the

fact that 100,000 shares of United stock were originally outstanding and the fact that the American shares and the Duhame shares aggregating 42,548 shares have been cancelled, it is clear that the former holders of United stock who will share in any recovery herein, represent ownership of only a fraction (57,452/100,000) of United stock originally issued and outstanding. The right of Provident to secure a judgment on behalf of the former United stockholders who will share therein is therefore limited to 57½% of the total claim, namely $180,856.

The surrender of stock can be viewed in two perspectives. First, it eliminated from the group of stockholders who might be deemed injured by the acts of defendants, the owners of 42½% of United stock. Secondly, such surrender of stock constituted restitution by certain of the alleged wrong-doers (American and Duhame), equal to the value of such stock. The value of such stock would be not less than an amount equal to that portion of the judgment herein which 42,548 shares bear to the total shares of United stock which were outstanding at the time of the merger. This amounts to approximately 42½%. Looking at the stock surrender from either perspective, it is clear that it would be grossly inequitable and unjust to demand a 100% indemnity from DePinto for the benefit of the holders of 57½% of United stock. For the purpose of argument, let us assume that American had acquired all but one share of United stock and had surrendered the same for cancellation. Under the circumstances, no one would reasonably contend that United (or its successor, Provident), would be entitled to recover from American and the other defendants the amount of United's assets diverted by American for the purpose of then paying such amount over to the holder of the one share of stock remaining outstanding.

In the case of *Perlman v. Feldmann*, (CCA 2), 219 F.2d 173, 50 A.L.R.2d 1134, cert. den. 349 U.S. 952, 75 S.Ct. 880, 99 L.Ed. 1277, the Court of Appeals stated:

> "Hence to the extent that the price received by Feldmann and his co-defendants included such a bonus, he is accountable to the minority stockholders who sue here. Restatement, Restitution §§ 190, 197 (1937); Seagrave Corp. v. Mount, supra, 6 Cir, 212 F.2d 389. And plaintiffs, as they contend, are entitled to a recovery in their own right, instead of in right of the corporation (as in the usual derivative actions), since neither Wilport nor their successors in interest should share in any judgment which may be rendered. See Southern Pacific Co. v. Bogert, 250 US 483, 39 S Ct 533, 63 L Ed 1099. Defendants cannot well object to this form of recovery, since the only alternative, recovery for the corportation as a whole, would subject them to a greater total liability." (50 A.L.R. 2d 1143)

In the *Perlman* case, Wilport participated in the wrongdoing just as American and Duhame participated in the wrongdoing in the case at bar. If American and the Duhames still held the 42,548 shares of United stock, it is clear that, in the light of *Perlman,* American and the Duhames would not be permitted to share in any judgment which might be rendered against DePinto. By reason of the Merger Agreement, this action is for the exclusive benefit of the holders of Certificates of Contingent Interest—former United stockholders, excluding American and Duhame. Provident is, in effect, acting as a trustee for such former stockholders. The recovery on behalf of the holders of Certificates of Contingent Interest can be no greater than the percentage of United stock which they held.

The rule is clearly stated in *Matthews v. Headley Chocolate Co.,* 130 Md. 523, 100 A. 645, 651:

> "* * * Inasmuch as by the change of the majority of stock those who were minority stockholders at the time of the transactions complained of are now able to have the suit brought in the name of the company, we are of the opinion that it can be maintained, in that name instead of in the names of the minority stockholders but for their benefit.

> But while that is so, if there be any recovery by reason of the claims spoken of, *it can only be to the extent of the proportions of the sum recovered due such minority stockholders,* if any, as are not barred by laches, limitations, acquiescence, or other way sufficient to bar them in equity, and anything recovered should be directed to be paid to them by the corporation." (Emphasis supplied.)

The Supreme Court of Washington has this to say in *Joyce v. Congdon,* 114 Wash. 239, 195 P. 29, 30:

> "The plaintiff complains of the fact that the recovery in this case was to him individually, and not to the corporation. It is true that the general rule is that in actions of this character the amount of the recovery will go to the corporation, and not to the individual minority stockholders. This rule, however, is not universal. If in awarding a recovery to a corporation it would result in a stockholder's receiving a portion thereof, to which he was not entitled, then a court of equity will look beyond the corporation, and decree the recovery to the individual stockholders entitled thereto. Brown v. De Young, 167 Ill. 549, 47 N.E. 863."

There are numerous cases in accord, including:

*Samia v. Central Oil Company of Worcester,* 339 Mass. 101, 158 N.E.2d 469, 482;
*Bailey v. Jacobs,* 325 Pa. 187, 189 A. 320, 330;
*Holland v. Presley,* 6 N.Y.S.2d 743, 744;
*Chonnis v. Laing,* 125 W.Va. 275, 23 S.E.2d 638;
*Stanton v. Schenck,* (S.Ct.N.Y. 1931) 251 N.Y.S. 221.

In the light of the above-mentioned authorities, it is clear that Provident, acting on behalf of only 57½% of the original stockholders of United, can recover from the defendant DePinto only 57½% of the amount of the alleged loss to United attributable to the acts of DePinto and his co-defendants, including American Security Investment Company and Duhame.

**(b) CREDIT FOR PAYMENT BY "JOINT TORTFEASOR"**

On July 12, 1965, the trial Court entered an order approving a settlement with the Executors of the Duhame Estate, calling for a payment by them of the sum of $100,000. Paragraph 3 of the order reads as follows:

> "The entire amount of the said settlement, being the sum of One Hundred Thousand Dollars ($100,000.00) plus the present value of the Certificates of Contingent interest surrendered by the Duhames for cancellation is allocated to the claims for damages to United Security Life arising during the period beginning June 30, 1956 and ending October 17, 1957, in the amount of $177,863.84." (T.R. 268)

In the lower Court, DePinto insisted that, as a result of the Duhame settlement, he was entitled to a credit of $100,000, upon the alleged claim of Provident against him. (R.T. 151-152; T.R. 241)

It is the settled law in Arizona that a payment made by one joint tortfeasor must be credited upon the claim made against another joint tortfeasor. *Fagerberg v. Phoenix Flour Mill Co.,* 50 Ariz. 227, 71 P.2d 222; *Igurrola v. Szychowski,* 95 Ariz. 194, 388 P.2d 242. The *Fagerberg* case is directly in point in that it involved an action brought by a corporation against one of its directors, alleging loss of $110,180.57, as a result of the joint negligence or wrongful acts of three directors. One of the directors (Melczer) paid to plaintiff the sum of $55,090.28, and took a covenant not to sue. The Court held that the defendant director was entitled to the credit for such amount. The losses to the corporation resulted from speculation in the stock market by Melczer and Fagerberg over a period from September, 1930 to April 1932. Although there may have been several losses to the corporation, the Court considered that there was but one joint claim against the three directors. In the *Igurrola* case, the Court held that payment made by one joint tortfeasor in consideration of a covenant not to

sue must be credited upon the claim against the other joint tort-feasor.

The action of the trial Judge in "allocating" the $100,000 Duhame payment to the "claims for damages to United Security Life arising during the period beginning June 30, 1956 and ending October 17, 1957 in the amount of $177,863.84" was meaningless. At the time of the Duhame settlement, the only claim against the Duhame Executors was the same claim made against DePinto, namely a claim for $314,794.19, resulting from the transfer of United assets to American on October 18, 1957 and set forth in the Amended Complaints of Doig and Provident. (T.R. 26, 44)

The claims referred to by the trial Court in the amount of $177,863.84,* arising during the period beginning June 30, 1956 and ending October 17, 1957, were claims made in the original Gorsuch complaint (T.R. 1) and which were dropped from the Complaints filed by Doig and Provident. (T.R. 24, 44) These claims were dropped from the later Complaints for the reason that by the original judgment entered in this cause, said claims were dismissed on the merits and with prejudice. (O.T. 354)

At the time of the Duhame settlement, there existed but one claim for which DePinto and the Duhame Executors might have been held liable, namely a claim for $314,794.19, arising out of a transaction which took place on October 18, 1957. If there were any other "claims" in the original Gorsuch Complaint, which survived the first Judgment in this cause, they were not reviewed by Doig or Provident after the first reversal. Under the decision of this Court in *Niesz v. Gorsuch*, 295 F.2d 909, it is clear that the original Gorsuch complaint must be treated as non-existent. By the merger, Gorsuch lost his right to maintain the action.

*The claims were actually $132,839.51; $46,839.51 alleged to have been wrongfully paid to Kelly and $86,000 alleged to have been wrongfully loaned by United to United Finance Corporation. (O.T. 246)

Under the opinion of this Court, the action could only be revived if Provident was joined or caused to be joined within a reasonable time, after remand. The action survived only to the extent that it was revived within a reasonable time. It was not revived at all with respect to any claim or claims exceeding $314,794.19. Furthermore, the statute of limitations has long since run upon any claim exceeding that amount. A.R.S. § 12-542 or § 12-550.

If DePinto is given the $100,000 credit to which he is entitled, it follows that any judgment against him herein in an amount exceeding $80,856 cannot be sustained.

**(c) INTEREST**

Notwithstanding DePinto's objection (T.R. 242), the trial Court included in the judgment against DePinto interest at the rate of 6% per annum from October 18, 1957 until payment. The imposition of interest from any date earlier than the date of judgment is erroneous.

The claim made herein against DePinto was for damages alleged to have been proximately caused by the negligence of DePinto and his fellow defendants. The claim was based upon the transfer of assets from United to American. Such assets consisted of $166,498.66 in cash or certificates of deposit, $60,668.65 in mortgages, bonds and accrued interest, and $87,626.88 in unsecured notes and accrued interest. The value of such assets—excluding cash and bank certificates of deposit—was, of course, subject to speculation and conjecture. Furthermore, United received 30,800 shares of the common stock of American in exchange for such assets. The loss sustained by United as the result of the transaction of October 18, 1957 could not be more than the value of its assets transferred to American less the value of the 30,800 shares of American stock received by it. Until the determination by a Court or jury of the amount of damage to United, DePinto had no way of determining with any degree of

certainty, the amount of damage for which he might be held liable.

In the case of *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, the Supreme Court of Arizona expressly overruled contrary decisions and held that "on an unliquidated claim interest should only be allowed from date of judgment." The Supreme Court quoted the following language from *Arizona Eastern R. Co. v. Head*, 26 Ariz. 259, 224 P. 1057, 1059:

> " '* * * If the claim is unliquidated and is in dispute no interest is allowed upon the theory that the person liable does not know the sum he owes and therefore can be in no default for not paying.' "

The ability of anyone to make some sort of an estimate as to the amount of loss or damages is not sufficient to create a liquidated claim. The case of *American Eagle Fire Ins. Co. v. Vandenberg*, 76 Ariz. 1, 257 P.2d 856, involved the claims of farmers against their insurance carrier for hail damage to their cotton crops. After inspecting the crops the insurance adjuster denied that there was a loss and damage by hail equal to 5% or more of the particular crops so damaged as the policy required before the insurance company would become liable thereon. The farmers instituted an action against the insurance company and recovered judgments totalling $2,240. Upon appeal the farmers claimed that they should have been allowed interest from the time the insurance proceeds became payable. The Supreme Court of Arizona held:

> "However, this was an unliquidated claim, and the extent of loss was not known until determined by the trial court. We hold the trial court properly allowed interest from the date of the judgment." (257 P.2d 859)

On the basis of the Arizona decisions above noted, it is submitted that the judgment entered herein cannot legally bear interest from a date earlier than the date of entry of judgment.

**(d) DISCHARGE OF JOINT TORTFEASORS**

By a stipulation entered into between the original plaintiff Gorsuch and the defendants James E. Kelly, L. N. Kelly, Nina Dunn and J. L. Jenkins, which stipulation was approved by order of the trial court, it was agreed that any judgment entered against any of said defendants herein would not exceed the sum of $308,000. (T.R. 24) As a result of such stipulation, the original judgment entered herein against said defendants was limited to $308,000. (O.T. 354) The stipulation and the judgment entered pursuant thereto had the effect of releasing and discharging the Kellys, Dunn and Jenkins of all liability in excess of $308,000. It is the law in Arizona that the release of one joint tortfeasor constitutes a release of all. *Fagerberg v. Phoenix Flour Mills Co.,* 50 Ariz. 227, 71 P.2d 1022; *Smith v. Pinner,* 68 Ariz. 115, 201 P.2d 741.

Aside from the rules applicable to a release, it is the law that, in an action against joint tortfeasors, judgment cannot be entered against any one defendant for an amount exceeding that entered against a co-defendant. 49 *C.J.S.* 88 § 36. *Brown v. Reorganization Investment Company,* 350 Mo. 407, 166 S.W. 2d 476; *Schwehr v. Badalamenti* (Ill.), 143 N.E. 2d 558; *Phipps v. Superior Court* (Cal.), 89 P.2d 698; *Donegan v. Beasley* (Tenn.), 181 S.W. 2d 379; *Callihan v. White* (Tex.), 139 S.W. 2d 129.

As a result of the stipulation above-mentioned and the judgment entered pursuant thereto against Kelly, et al., in the amount of $308,000, DePinto was automatically released from all liability in excess of that amount. When DePinto is given a proper credit for the amount of the American and Duhame stock which was cancelled (42½% of $308,000), namely $130,900, plus the $100,000 payment made by the Duhame Executors, we find that any judgment against DePinto of more than $77,100 is excessive and cannot be sustained.

**8. Error in Severing Claim. (Question No. 9. Specifications of Error Nos. 8 & 11.)**

On the morning set for trial of this action as to Defendants DePinto, Sabo, Pegram, Landoe and the Duhame Executors, the Court approved the Duhame settlement, severed the case as to DePinto and ordered consolidation of the case (Civil 2974-Phoenix) with Cause No. Civil 3062-Phoenix, as to the defendants Sabo, Pegram and Landoe. (T.R. 292; R.T. 171) The severance was made over the objection of DePinto. (R.T. 166, 169)

We submit that, if DePinto can be held liable for damages to United resulting from the transaction of October 18, 1957, it can only be on the theory that he is vicariously liable for the conduct of Sabo, Pegram, Landoe, Niesz, et al., in causing assets to be transferred from United to American. DePinto's liability (if any) is secondary and he can, therefore, look to Sabo, Pegram, Landoe, et al., for indemnity under his cross-claim. *Busybee Buffet v. Ferrell,* 82 Ariz. 192, 310 P.2d 817 (1957). The ruling of the trial Court deprived DePinto of his right to proceed against Sabo, Pegram and Landoe upon his cross-claim against them.

As a result of the trial Court's action, the attorneys for plaintiff presented evidence to the jury only in the form of documents, "admitted facts" and testimony adduced at the initial trial. DePinto was deprived of the opportunity to cross-examine Sabo, Pegram and Landoe.

We respectfully submit that the trial Court's action was not authorized under the provisions of Rule 21 of the Federal Rules of Civil Procedure, which reads:

> "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

As pointed out by Professor Moore (3 *Moore's Federal Practice* 2910 ¶ 21.05), Rule 21 should be construed to authorize a severance only where there has been a misjoinder of parties. There was no misjoinder in this case.

Aside from the proper interpretation of Rule 21, it is obvious that the action of the trial Court was highly prejudicial to DePinto and constituted an abuse of any discretion which the trial Court might have had. Although DePinto's connection with the transaction of October 18, 1957 was remote compared with that of Sabo, Pegram and Landoe, he was placed in the position of a "target" defendant for the jury to shoot at. If the jury felt that plaintiff was entitled to some relief as a result of the October 18, 1957 transaction, its power to grant some relief could only be directed against DePinto. Conclusive evidence of the prejudice to DePinto is found in the verdict rendered in his favor at the initial trial—a trial which involved all of the parties who were in any way connected with the transaction of October 18, 1957.

### 9. Denial of Fair Trial. (Question No. 10. Specifications of Error Nos. 9 & 11.)

After reversal of the second judgment herein, DePinto, upon motion for rehearing, requested that this Court order a retrial of the action before a District Judge other than The Honorable George H. Boldt. The request was not granted. Thereafter, and on the 20th day of November, 1964, DePinto filed in the lower Court an Affidavit of Bias or Prejudice pursuant to 28 *U.S.C.A.* § 144. (T.R. 64) After a hearing, on December 2, 1964, before Judge Carl A. Muecke, an order was entered striking the Affidavit. Judge Boldt then concurred in the order of Judge Muecke, striking the Affidavit. (T.R. 287)

For the convenience of the Court, we have reproduced the Affidavit in full in Appendix E to this Brief. We respectfully submit that the Affidavit fully supports the conclusion stated in

the Affidavit, "That Judge Boldt is not able to consider the issues involved in this action with an open mind. The record demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial Judge."

We submit that the conduct of Judge Boldt subsequent to November 20, 1964 confirms the Affidavit. It cannot be doubted that a jurist of the intellectual caliber of Judge Boldt could not have committed error after error in the trial of this cause unless he found it impossible to view the case dispassionately and objectively. We do not, for one minute, challenge the bona fides of Judge Boldt. Unfortunately, however, and at some time during the many, many months that this action has been pending, Judge Boldt subconsciously assumed the role of an advocate, rather than that of a judge.

During the pretrial proceedings incident to the last trial, Judge Boldt took a very sympathetic view towards the contentions of plaintiff's attorneys that the claim against DePinto, et al., was not limited to the sum of $314,794.19, as prayed for in the Doig Complaint (T.R. 26) and the Provident Complaint (T.R. 44). Plaintiff's attorneys insisted that they were entitled to claim $177,863.84, on account of matters occurring between June 30, 1956 and October 18, 1957, and the sum of $60,695.60, on account of matters occurring subsequent to October 18, 1957. (T.R. 159-160; R.T. 62-120, 154) One of plaintiff's attorneys stated:

> "So we have claims, as I say, well over $800,000, closer to $825,000." (R.T. 154)

Judge Boldt ruled that plaintiff was entitled to proceed upon any claim that had ever been made in the case, notwithstanding, that claims in excess of $314,794.19, had been dismissed in the original judgment and dropped from the Amended Complaints.

(R.T. 85, 120, 156) Plaintiff's contentions were carried into the Pretrial Order (T.R. 159-160), which included the statement:

> "The Court orders that as a result of this pretrial order the pleadings pass out of the case * * *"

When counsel for DePinto refused to approve the Order because it destroyed their position that plaintiff's claim was limited to the pleadings (R.T. 122-123), Judge Boldt indulged in the following intemperate and unwarranted remarks:

> "In my mind, this is one of the most disgraceful incidents that I have seen in my entire period of practice, and especially in the period that I have been on the bench. It is a discredit to each one of you that any such thing as this should arise and occur. In my opinion, you have misled me into believing that you were at the very last stage of agreeing upon a pretrial order that would be approved for entry. Not the slightest mention has been made otherwise until this moment, and in my opinion, this is unworthy of reputable counsel, and I find it difficult to be restrained in my comments about it.
>
> "I thought I was trying to be as courteous and decent and friendly and considerate to you people as I possibly could be, and you have treated me with disrespect and discourtesy, and I resent it tremendously." (R.T. 126-127)

That Judge Boldt later apologized for his remarks (R.T. 144) is beside the point.

If there is any one thing in the record which alone demonstrates the inability of Judge Boldt to be fair to DePinto, it is the ruling which he made depriving DePinto of a credit on account of the $100,000 Duhame settlement, immediately followed by the severance ruling which left DePinto as the only person upon whom the jury could impose liability, should it believe that Provident, as the successor of United, was entitled to damages by reason of the conduct of the Niesz group on October 18, 1957. (R.T. 151-171; T.R. 206)

DePinto's Affidavit of Bias and Prejudice was filed pursuant to 28 *U.S.C.A.* § 144, reading, in part, as follows:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

In the case of *Berger v. United States,* 255 U.S. 22, 65 L.Ed. 481, 41 S. Ct. 230, the Supreme Court of the United States stated with respect to the above-quoted statute:

> "Nor is it our function to approve or disapprove it; but we may say that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them, but shall give assurance that they are impartial,—free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. Its explicit declaration is that upon the making and filing of the affidavit, the judge against whom it is directed 'shall proceed no further therein, but another judge shall be designated in the manner prescribed in § 23 to hear such matter.' "

In the case of *Re Murchison,* 249 U.S. 133, 99 L.Ed. 942, 75 S. Ct. 623, the Supreme Court of the United States said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."

In *Mitchell v. United States,* 126 F.2d 550 (10 Cir. 1942), the Court said:

> "The purpose of this section is to secure for all litigants a fair and impartial trial before a tribunal completely divested

> of any personal bias or prejudice, either for or against any party to the proceedings, and it is the duty of all courts to scrupulously adhere to this admonition and to guard against any appearance of personal bias or prejudice which might generate in the minds of litigants a well-grounded belief that the presiding judge is for any reason personally biased or prejudiced against their cause."

The order of Judge Muecke striking the Affidavit of Bias or Prejudice (which order was joined in by Judge Boldt), states that the Motion to Strike was granted, "for the reasons that the said affidavit is not sufficient in that the affidavit fails to show facts or reasons to indicate personal bias or prejudice on the part of The Honorable George H. Boldt against the defendant, Angus J. DePinto, and for the further reason that the affidavit is not timely * * *"

Although there are numerous decisions to the effect that an Affidavit of Bias or Prejudice must be based upon something other than rulings against a litigant, in the case of *Whitaker v. McLean,* 118 F.2d 596 (USCA D.C. 1941), the Court stated:

> "The policy underlying Section 21 is that the courts of the United States 'shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial'; i.e., shall appear to be impartial. Berger v. United States, 255 U.S. 22, 36, 41 S.Ct. 230, 234, 65 L.Ed. 481. A bias which develops during the trial and is 'grounded on the evidence' has been held not to be within the terms of Section 21. Craven v. United States, 1 Cir., 22 F.2d 605, certiorari denied 276 U.S. 627, 48 S.Ct. 321, 72 L.Ed. 739. Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feeling are as hard to avoid as the feeling itself. *But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think*

*it disqualifies him. It follows that the judgment must be reversed.*" (Emphasis supplied.)

We submit that, under the provisions of 28 *U.S.C.A.* § 144, the filing of the Affidavit of Bias or Prejudice deprived Judge Boldt of all right, power or authority to take any further action in the case. So far as DePinto is concerned, it is immaterial why such bias developed or how it is demonstrated. He was entitled to a trial before an impartial judge and, as confirmed by subsequent events, this he did not receive. We suggest that this Court should be no less sensitive to the rights of DePinto than was the Tenth Circuit Court of Appeals with respect to the rights of the United States, as disclosed by the case of *United States v. Ritter,* 273 F.2d 30 (10 Cir. 1959). That action was instituted by a Navajo indian under the Federal Court Claims Act for the purpose of recovering damages for the unlawful seizure and destruction of 115 horses and 35 burros belonging to the plaintiffs. The trial Judge entered judgment for the plaintiffs in the sum of $100,000. The judgment was reversed by the Tenth Circuit (*United States v. Hatahley,* 220 F.2d 666); however this decision was reversed by the Supreme Court of the United States (*Hatahley v. United States,* 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065) and the case was remanded to the trial Court for specific findings as to damages. Upon remand, the District Court took additional evidence on the issue of consequential damages and, without an amendment of the complaint, entered a judgment against United States for the total sum of $186,017.50. This second judgment was reversed by the Tenth Circuit in *United States v. Hatahley,* 257 F.2d 920 (10 Cir. 1958). In its opinion, the Court said:

> "Somewhat in analogy to the procedure outlined in Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, and Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11, we suggest that when the case is remanded to the

> District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See La Buy v. Howes Leather Co., 352 U.S. 249, 259, 77 S.Ct. 309, 1 L.Ed.2d 290."

After the mandate was received by the trial Court and during a hearing upon certain motions made by the United States, the trial Court took note of the suggestion of the Court of Appeals that the case be heard before another judge, but stated for the record that he did not "intend to follow that suggestion so you can lay that to one side." The United States then sought relief from the Tenth Circuit. The Court ruled:

> "In view of the whole record before this court, we are convinced that the United States cannot obtain a fair and impartial trial before the presently presiding judge, and that the proper administration of justice requires that further proceedings in the case be heard before another judge. And, it now conclusively appears that the said respondent judge will not heed the court's suggestions that he take proper steps to excuse himself and reassign the case. It is therefore ordered that further proceedings in this case be heard before a judge to be designated by the Chief Judge of this Circuit, pursuant to Section 292(b), Title 28 U.S.C., and that the respondent take no further action herein." (273 F.2d 30)

The Court also stated:

> "When the case was first here in United States v. Hatahley, 10 Cir., 220 F.2d 666, 670, we observed that it had been 'tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.' " (273 F.2d 31)

We submit that the record in this case shows that, from the beginning, it was "tried in an atmosphere of maximum emotion and minimum of judicial impartiality". The original judgment entered by Judge Ritter in the *Hatahley* case was $100,000, but

on remand, he boosted it to $186,017.50. The original judgment in this case was entered against DePinto for the sum of $314,-794.19. After the first remand, Judge Boldt entered a new judgment against DePinto for a like amount, plus interest from October 18, 1957, which amounted to over $100,000. After the second remand, Judge Boldt took the position that the claim against DePinto was not limited to $314,794.19 plus interest, but included an additional claim or claims of over $177,000, which were not found in the current complaints. (R.T. 62-120) When counsel for plaintiff indicated that the triable claims totaled about $825,000, the Court did nothing to disabuse him. (R.T. 154) And, then, when the Duhames agreed to pay $100,000, in full settlement of the claim against them in the amount of $314,794.19, Judge Boldt decided that such payment would not reduce *pro tanto* the claim against DePinto for the identical amount.

There can be no doubt that the Affidavit was timely filed. This was done well in advance of any proceedings taken by the trial Judge after the second reversal. In the case of *Laughlin v. United States,* 344 F.2d 187 (U.S.C.A. D.C. 1965), the Court recognized that an affidavit of bias or prejudice filed after the judge had presided, without objection, for two days over hearings on pre-trial motions, was not timely. The Court said, however:

> "If on remand, however, the case should be assigned to the same District Judge, the affidavit should be considered. If it is found to be legally sufficient, the District Judge should, in accordance with 28 U.S.C. § 144, 'proceed no further' herein."

When Judge Boldt, after the first reversal, gratuitously advised the attorneys for defendants that they should not "go shopping" for another judge, and that he intended to stay with the case until its conclusion, he, at that early date, disclosed a mental attitude which compelled him, over two years later, to ignore De-

Pinto's Affidavit of Bias or Prejudice. Judge Boldt must have felt that, without his guiding hand, justice could not be done for United and its stockholders. The conduct of an overzealous advocate can be ameliorated by the restraints imposed by a good judge. There is no restraint, however, upon an overzealous judge.

We are quite sure that, in his own mind, Judge Boldt has, at all times, felt that he could act with complete impartiality in this case, not only as to DePinto, but as to every other party-litigant. But the question of impartiality goes much farther than the subjective beliefs of the judge with respect thereto. DePinto, as well as every other litigant, is entitled to a trial before a judge who is not only impartial, but appears to be impartial. In the case of *Rapp v. Van Dusen,* 350 F.2d 806, 812 (3 Cir., 1965) the Court of Appeals for the Third Circuit said:

> "For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel."

This statement was quoted by the Tenth Circuit in *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10 Cir. 1965). And in *Winebrenner v. United States,* 147 F.2d 322 (8 Cir. 1945), the Eighth Circuit quoted:

> "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than the negation of that right. An unfair trial adds a deadly pang to the bitterness of defeat."

The right to a fair trial, before an impartial judge, is implicit in the Fifth Amendment to the Constitution of the United States. Such constitutional guaranty has been denied to DePinto.

## CONCLUSION

We respectfully submit that the judgment against DePinto must be reversed with instructions that the trial Court grant his motion for judgment made pursuant to Rule 50(b), Federal Rules of Civil Procedure. The evidence does not support a judgment against DePinto upon either the issue of liability or the issue of damages. If this Court should take a contrary view, a new trial should be ordered upon any one of the numerous grounds hereinabove discussed—a new trial before a new judge.

In any event, it is clear that a judgment against DePinto for any amount in excess of $80,856 cannot stand.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH S. JENCKES, JR.

**(Appendices Follow)**

## APPENDIX A

The trial Court erred in the admission of evidence over the objection of appellant, namely:

**(a) Evidence:**

Life Undewriters, Inc., a management corporation, was organized on June 16, 1952. DePinto owned stock in the company, for which he paid $2,000. He knew that its purpose was to sell life insurance. *Objection:* "We object to 21, if your Honor please, on the ground that it is wholly immaterial and irrelevant. It has to do with some company other than the one with which we are concerned, and has nothing to do with the transaction involved in this matter." (R.T. 183)

**(b) Evidence:**

On October 1, 1952, Life Underwriters, Inc. issued a prospectus for the sale of its stock to the public in which DePinto was listed as one of its directors. For a period of approximately two years, DePinto was a member of the Board of Directors of Life Underwriters, Inc., and presumed that his name was being used as such. *Objection:* "Maybe to shorten, if your Honor please, I would object to (Admitted Facts numbered) 23, 24 and 25, for the reason that these facts could not have any possible connection with the issue in this case, particularly, in view of the fact that we are concerned only with the transaction that took place on October 18, 1957." (R.T. 181)

**(c) Evidence:**

"DePinto attended a meeting of United directors and shareholders which was held on March 29, 1955. DePinto attended at the request of Kelly and he heard James Burk and Dr. Harry Cumming at that meeting." *Objection:* "To which we object on the grounds that it is wholly irrelevant and could have no connection with October 18, 1957." (R.T. 186-187)

**(d) Evidence:**

Exhibit 4B. Minutes of a meeting of the Board of Directors of United of March 29, 1955, which include the statement that numerous stockholders were present at the meeting at the request of Dr. Cumming, and most of the discussion was concerned with the dissatisfaction of the stockholders. *Objection:* "I call your attention to the fact, your Honor, that Dr. DePinto was not a member of the Board of Directors at that time. The whole business would be hearsay as far as he is concerned, and it wouldn't prove or tend to prove any issue in this case involving the transaction of October 18, 1957. For the purpose of saving time in the future your Honor, I think you can appreciate that our objections so far have gone to all of the antecedent material, antecedent to October 18, 1957, because you have taken out of the case any issues with respect to any defalcations or mismanagement prior to October 18, 1957. So that this really has nothing to do with this case. * * * Our objections would go to the fact that this is, so far as Dr. DePinto is concerned, pure hearsay." (R.T. 187-191)

**(e) Evidence:**

DePinto attended a meeting of the Board of Directors of United Security Life in 1955, at which Dr. Harry Cummings appeared. Dr. Cumming complained about the management of United. The meeting was called by Kelly to hear the complaints of one James Burk, to the effect that the company was not being administered properly. *Objection:* "The Court: Any objection to this? Mr. Jenckes: Yes, this has nothing to do with this lawsuit. We are concerned with the transaction that took place on October 18, 1957 also a transaction involving United Security Life. A lot of this has to do with another company." (R.T. 194-197)

**(f) Evidence:**

Exhibit 4G. Minutes of a meeting of the Board of Directors of United held on November 15, 1955, at which it is stated, among other things, that it was agreed by the Directors that a report of the stockholders meeting and the progress of the company should be sent out to all stockholders at an early date, such suggestion having been made by Dr. DePinto. Finding of Fact No. 59 "Neither DePinto nor Duhame attended the said November 15, 1955 meeting of United's Board of Directors." *Objection:* "Mr. Jenckes: Same objection. The Court: Overruled. Mr. Kohn: I have no objection if counsel wants a continuing objection. The Court: A standing objection on the same grounds to any portion of the Admitted Facts read in each instance. Satisfactory? Mr. Jenckes: It occurred to me I would anticipate if an objec * * * The Court: I will read just ahead of the reading that is made, and in each instance you will be deemed to have made an objection on the same grounds previously stated, and if I do not speak or in any rule, you will understand that your objection is overruled, exception allowed. Mr. Jenckes: Very well, your Honor." * * * "We object on the grounds that it is wholly immaterial and irrelevant and has nothing to do with the transaction of October 18, 1957." (R.T. 199-202)

**(g) Evidence:**

Exhibit 5F, being the minutes of a meeting of the Board of Directors of United held on February 19, 1957, which state that Dr. Angus DePinto was present in person. Admitted Fact No. 87 says: "Neither DePinto nor Duhame attended a February 19, 1957 meeting of United's Board of Directors." *Objection:* (See continuing objection R.T. 199.) "The same objection, if your Honor please." (R.T. 203)

**(h) Evidence:**

The minutes of United's Board of Directors state that a meeting of United's directors was held on June 22, 1956. Neither DePinto nor Duhame attended the said June 22, 1956 meeting of United's Board of Directors. *Objection:* (See continuing objection R.T. 199-200.) (R.T. 205)

**(i) Evidence:**

On July 18, 1956, at a special meeting of United's Board of Directors, Kelly resigned as president and a director of United. DePinto signed a Waiver of Notice of said meeting. DePinto did not read the minutes of the July 18, 1956 meeting and did not know that Kelly had resigned as president and director of United. DePinto remained unaware of Kelly's resignation as president up to and including October 18, 1957. *Objection:* (See continuing objection R.T. 199-200) (R.T. 206)

**(j) Evidence:**

DePinto thought Kelly was president of United up to October 18, 1957. During his tenure as a director of United, DePinto never made a telephone call to United's office to obtain information concerning United's financial condition. DePinto, during his tenure as a director of United, did not examine the report of the Director of Insurance prepared for United for the year ending in June, 1956. DePinto, during his tenure as director of United, never called at United's offices. It was DePinto's impression that United earned a profit for the year 1955, whereas it actually sustained a loss. DePinto did not know whether United earned a profit or not in the year 1956. DePinto did not know who were the officers of United from July 18, 1956 to October 18, 1957. DePinto never wrote a letter or sent a notice of any kind to the shareholders of United that he did not intend to actively participate as a director of United. *Objection:* (See continuing objec-

tion R.T. 199-200) Also see page 207: "Mr. Jenckes: As I understand it, our same objection goes to all of this? The Court: Yes it does." (R.T. 208-209)

**(k) Evidence:**

Exhibit 83, Kelly's federal income tax return for the year 1957, showing that Kelly valued and paid income tax on assets transferred to him at the full value to him of $308,000. *Objection:* "That would be completely and wholly inadmissible. It would be wholly hearsay, as far as Dr. DePinto is concerned." (R.T. 224) "Same objection." (R.T. 329)

**(l) Evidence:**

Exhibit 16, constituting page 61 of a report prepared by Mr. Guy L. Hammett, Senior Examiner for the Insurance Department of Arizona. Page 61 appears to be a summary of operations of United for the year ending December 31, 1957. *Objection:* "First of all Exhibit No. 16 purports to show certain things with respect of assets and liabilities and surplus etc. of United Security Life as of December 31, 1957. It is quite obvious, your Honor, there could have been many, many changes that could have occurred in the assets or liabilities of that company between October 18, 1957 and the end of the year, for which Dr. DePinto, of course, would not be responsible for in any way, shape or form. So that first of all, the evidence would be completely immaterial and irrelevant. It wouldn't help out in this case. It would not prove or disprove any material issue. * * * Thus, this Circuit and most of the other Circuits would—which have passed on the question, have held that the facts stated in the document must have been within the personal knowledge and observation of the recording official or his subordinates, and that reports based upon general investigations and upon information gleaned second-hand from random sources must be excluded." Citing *Olender v. United States,* 210 F.2d 795 (9th Cir. 1954). (R.T. 239-249, 264)

**(m) Evidence:**

At the close of business on October 17, 1957, there was a deficit in the capital stock and surplus of United. The financial statement of United for the period ending December 31, 1957, shows a deficit in surplus in the amount of $352,844.56. *Objection:* "To which we object on the grounds, if your Honor please, that this report was made in conjunction with other people and was made after discussing these matters with the individuals and is not necessarily a report or opinion predicated upon anything other than hearsay testimony. Furthermore, the record discloses that he didn't make a report as of October of 1957. All of his conclusions were with respect to December 31, 1957 and for that reason we object to that testimony." (R.T. 262-263)

**(n) Evidence:**

In addition to his medical practice, Dr. DePinto has substantial investments. *Objection:* "This is immaterial. * * * Well, if your Honor please, we reiterate it is wholly immaterial and irrelevant to any issue in this case." (R.T. 506-507)

**(o) Evidence:**

For two years, Dr. DePinto let things run the same way—the signing of minutes of a meeting which said you were there when you never were there. *Objection:* This is highly immaterial and irrelevant. (R.T. 511-512)

## APPENDIX B

The trial Court erred in rejecting evidence offered by appellant, namely:

**(a) Evidence:**

Kelly was introduced to Ballantyne and Niesz by Croydon some 30 days prior to October 18, 1957. They presented to Kelly a program for the purchase of his stock and he agreed if the plan were feasible and acceptable to the Insurance Commissioner and Sureties Commissioner, they could probably get together. Kelly was told that a man from Montana intended to invest a substantial sum of money in the transaction. This was Dr. Sabo. *Objection:* "If your Honor please, to the balance we object. I think your Honor has ruled on that objection. I think that testimony all becomes abortive. It is completely immaterial." (O.T. 442-443; R.T. 294-295)

**(b) Evidence:**

A man by the name of Tompane was going to arrange for approximately $500,000 worth of mortgages to be assigned over to American, which would put about a quarter of a million dollars in additional surplus in United. *Objection:* "The same subjects your Honor ruled on." (O.T. 474; R.T. 302)

**(c) Evidence:**

Kelly knew Croydon and Niesz and that, although they weren't wealthy, they were responsible financially. (O.T. 475; R.T. 303-304)

**(d) Evidence:**

Mr. Earl Glenn, former Securities Commissioner of the State of Arizona, looked over the agreements before they were signed. "He passed it as being regular." "The Court: That is the end there." (O.T. 482; R.T. 308)

**(e) Evidence:**

According to Kelly, the details of the transaction (consummated on October 18, 1957) were checked with the Director of Securities and the Insurance Department of the State of Arizona. Niesz and Tompane went to the Director of Securities and Croydon and Heineman went to the Insurance Department. *Objection:* "The rest is objected to." (O.T. 434; R.T. 310)

**(f) Evidence:**

Kelly was told that there was a large investor in American and that he was putting more money into it. *Objection:* "The next is objected to, Sir." (O.T. 485; R.T. 311)

**(g) Evidence:**

At one time, Croydon and Heineman had Kelly's shares of stock sold to other parties at a figure of about $440,000. An insurance company that has $27,000,000 worth of policies outstanding has value to the corporation in excess of the actual admitted assets contained on the balance sheet. The amount of insurance outstanding would be a basic consideration in determining the sales price of insurance company stock. *Objection:* "That is objected to, completely immaterial, and there was no sale." (O.T. 498; R.T. 316-317)

**(h) Evidence:**

After Croydon and Heineman visited the Insurance Commissioner, Kelly called him and was told that the plan as presented would be approved. *Objection:* "That is objected to." (O.T. 517; R.T. 321)

**(i) Evidence:**

During the week, including October 18, 1957, the plans were formulated and checked and they went out to the Insurance Com-

missioner and the Securities Director. *Objection:* "The next is objected to." (O.T. 531; R.T. 322)

**(j) Evidence:**

During the meetings of the week of October, 1957, which were attended by Goss, Heineman, Croydon, Neisz, Ballantyne and Kelly, et al., Kelly was told that mortgages would be forthcoming to American. Kelly was told by Niesz, Ballantyne, Heineman and Croydon that the mortgages would be coming through Mr. Tompane of Phoenix Title & Trust Company and that he was getting them from people who had mortgages in trust with Phoenix Title. *Objection:* "The next is objected to, Sir." (O.T. 532-533; R.T. 323)

**(k) Evidence:**

On October 18, 1957, United had some $27,000,000 of insurance in force, of all kinds of policies; life, annuity, life insurance, and certain types of life insurance. *Objection:* "Objected to, that is the same subject to which your Honor sustained an objection just a while ago." (O.T. 553-555; R.T. 324)

**(l) Evidence:**

Based upon his actuarial experience, Croydon made an estimate of the value of Kelly's stock in United. Based upon such valuation, he fixed an asking price for Kelly's stock somewhere in the range of $600,000. Croydon's valuation was around $450,000. This was in June of 1957. In negotiating with another company, a sales price of $405,000 for Kelly's stock was agreed upon. *Objection:* "This testimony is immaterial." (O.T. 927-930; R.T. 334, 337)

**(m) Evidence:**

Exhibit 101. A telegram from Croydon to Landoe, dated October 14, 1957, and reading:

"PRB032 LB243 (40)

"L PFC 350 LONG PD=PHOENIX ARIZ 14 330 PMM=
"HJALMER LANDOE, ATTY= 1957 OCT 14 PM 3 56
"BOZEMAN MONT:

"WE SELL 349,000 ASIC STOCK TO UNITED FOR CASH BOND ETC WE USE THIS MONEY PLUS 51,000 TO PURCHASE 40 PERCENT OF UNITED STOCK. UNITED EXCHANGES 349,000 ASIC STOCK FOR MORTGAGES WHICH ARE ADMITTED ASSETS WITH AN OPTION TO REBUY STOCK ON A YEARLY BASIS USING MORTGAGE INCOME MORTGAGE HOLDER WILL GAIN 2 PERCENT PLUS PRESENT INTEREST ON MORTGAGES IN FORM OF CAPITAL GAIN DUE TO OUR REPURCHASING STOCK AT INCREASED PRICE TO COVERM THIS. STATEWIDE BUYS PROFITS FROM ANNUITIES FROM UNITED FOR 300,000 PAYABLE AT RATE 15,000 PER YEAR. MINIMUM PROFIT ON ANNUITIES 12,000 PER YEAR MAXIMUM 55,000 PER YEAR FOR 28 YEARS. ASIC GUARANTEES PAYMENT BY STATEWIDE BY SELLING 300,000 STOCK FOR 300,000 MORTGAGES WITH SAME OPTION TO REPURCHASE. UNITED WILL YIELD PROFITS OF 75,000 PER ANNUM BASED ON PRESENT INFORCE. WE WILL REACTIVATE SALES FORCE AND SELL SPECIAL POLICY ON WHICH WE CAN SHOW A FIRST YEAR GAIN. UNITED HAS 6.6 MILLION INSURANCE PLUS 18.5 MILLION ANNUITIES. BEFORE THE YEAR IS OUT WE WILL TRADE ANOTHER 25,000 ASIC STOCK TO UNITED FOR CASH AND USE THIS CASH TO BUY TREASURY STOCK AT 1.00 PER SHARE TO INCREASE ASIC HOLDING OF UNITED STOCK AT 51 PERCENT. AS ASIC STOCK IS REDEEMED FROM MORTGAGE HOLDERS WE WILL CONTINUE TO EXCHANGE IT FOR OTHER MORTGAGES. AT END OF FIVE YEARS WE WILL HAVE OPTION TO REDEEM ALL OUTSTANDING STOCK BY EXCHANGING SAME MORTGAGES REDUCED BECAUSE BY

THEN ASIC STOCK WILL BE ADMITTED ASSET FOR UNITED. THIS GIVES US A FULL LEGAL RESERVE COMPANY WITH 100,000. CAPITAL AND 350,000. SURPLUS WHICH SURPLUS MAY BE USED TO ACTIVATE ALL OUR OTHER LEGAL RESERVE COMPANIES OR TO PURCHASE OTHER MANAGEMENT CONTRACTS OR COMPANIES INCLUDING BOTH LARGE ONES SPOKE OF PREVIOUSLY. HOW SOON CAN WE EXPECT PEG. BEST REGARDS=

R B CROYDON="

*Objection:* "Object to its materiality." (R.T. 344)

**(n) Evidence:**

On September 12 and 13, 1957, Croydon and Heineman met with representatives of The Insurance Corporation of America in Cincinnati. The Insurance Corporation proposed to buy Kelly's stock in United. The mechanics were that United would purchase from Insurance Corp. $308,000 worth of stock of Michigan Securities to be paid for by $308,000 of assets involved in this case. Kelly was to receive $405,000, as the purchase price of his stock in United. InsuranceCorp. withdrew from the transaction. Croydon then suggested to Niesz that they acquire Kelly's stock. Croydon discussed the matter with Mr. Bushnell and was advised that Croydon's proposal to have American buy the Kelly stock could not be done. Niesz suggested to Croydon that they confer with Mr. Tompane for the purpose of determining whether assets could be made available to American or United. Heineman and Croydon discussed the matter with Tompane and were advised that $1,000,000 worth of mortgages could be obtained. It was agreed that $650,000 worth of mortgages would be sufficient to do the job. Mr. Toll, the Securities Commissioner, advised that a prospectus would not be required for United to buy the stock of American or for the acquisition of mortgages through Mr. Tom-

pane. These transactions would be exempt under the Securities Act. On October 18, 1957, Croydon thought that mortgages had been made available through Mr. Tompane. Among the assets transferred to American by United Finance Company in the amount of $86,000 which Croydon did not believe would qualify as an admitted asset. The status of the McKinley mortgage in the amount of $33,424.12 was doubtful. The transaction disclosed by plaintiff's Exhibit 5H included the purchase by Statewide Benefit of United's future income from annuity contracts for a purchase price of $300,000. At the time of the transfer of the American stock to United, the American stock had value. *Objection:* "The next questions are hearsay and are actually contrary to fact. They are hearsay." (O.T. 958-974; R.T. 355-362)

**(o) Evidence:**

Kelly had approximately 40% of the stock in United which had a value in the neighborhood of $450,000. The remaining 60% of the stock had a value of $1,120,500. If $308,000 in assets were removed from the company, it would not follow that the stock in the company, 100% of the stock, was valueless. This would be true, even though, under the technical insurance law, the company might be referred to as "impaired". (O.T. 1012-1013; R.T. 376)

**(p) Evidence:**

When Croydon went to the meeting in the office of Jennings, Strouss, Salmon & Trask on October 18, 1957, he believed that American had the mortgages—that they were committed, were available and that it was a matter of mechanics for a physical transfer. Croydon's belief in this respect was based on his conversation with Mr. Niesz and Mr. Tompane. Mr. Niesz had conferred with Mr. Goss, who was to take care of the mechanics. (O.T. 1019-1020; R.T. 377)

**(q) Evidence:**

An impaired insurance company can have marketable value. A company who operates at a loss can be sold for money. A company can have $6,000,000 worth of business that people will pay for. You have $18,000,000 of annuities which have very real value. It is possible that the value of the stock of the insurance company would be greatly in excess of the capital and surplus. (O.T. 1023-1025; R.T. 379)

**(r) Evidence:**

Within a week before the deal was consummated, Niesz had a conference with Kelly, Croydon, Heineman and Dunn. The meeting was about October 14. After the meeting, Niesz and Croydon went down to see Mr. Tompane at Phoenix Title & Trust Co., to see whether or not the assets were available immediately on the mortgage trade-out deals. On numerous occasions, Tompane had told Niesz about the mortgages that would be available on a stock trade-out with an organization or vehicle of this type. So, when the situation arose, Niesz went directly down to see Mr. Tompane. Croydon explained to Tompane about the amount of assets and financing that would be possible to take over United and Tompane agreed that it would be a very lucrative situation, that he was willing to cooperate and would furnish the assets. *Objection:* "So that I think this is completely immaterial. It is no defense to them. It is simply dragged before the jury as an extraneous, irrelevant matter, a matter which your Honor has ruled on again and again * * *." (O.T. 600-602; R.T. 484-487)

**(s) Evidence:**

Through the transaction of forming American and acquiring United stock, Niesz was guided, in part, by some attorney's advice. Harry Goss was Niesz' personal attorney. Heineman represented

American. Both Goss and Heineman knew that assets were to be taken out of United and paid over to Kelly. Goss and Heineman told Niesz that the transaction was illegal, but with the understanding of the plan of mortgages which had been discussed with the Securities Division and the Insurance Department, they thought it was proper. To satisfy himself that the mortgages were available, Niesz had endless meetings with Mr. Tompane, who assured Niesz that they should go ahead with the deal and he would have the mortgages. Niesz expected to get the mortgages immediately after the transaction. Tompane told Niesz and Croydon to go ahead with the deal and he would supply the mortgages. Agreements were signed in the office of Jennings, Strouss, Salmon & Trask on October 18, 1957. By 5:00 P.M. on that day, assets were delivered to Mr. Kelly. The following Monday morning, Niesz went to see Tompane. Niesz then found out that Tompane had only prospective mortgage holders, it wasn't a reality. He didn't have them. He hoped to get them. Tompane had prospects lined up that he had talked to by phone or was going to talk to, but at the moment, he didn't have one red nickel of them. (O.T. 659-663; R.T. 488)

**(t) Evidence:**

Niesz is 46 years old and has lived in Arizona 13 years. He came to Arizona from Ohio. He has been in the life insurance business in Ohio and Arizona. Niesz organized the American Security Insurance Company in 1954, a benefit company. Mr. Harry Goss represented Niesz, as his attorney, at the time American Security Insurance Company was organized. He retained Mr. Croydon as actuary in 1957. In February of 1957, Ballantyne became associated with Niesz, in the management of American Security Insurance Co. In the middle of October, 1957, Croydon told Niesz that Kelly wanted to sell his stock in United. Niesz, Croydon and Ballantyne had been giving thought to setting up

a management company a considerable time before Niesz knew Kelly's stock was for sale. The price which Kelly was asking for his stock in United, approximately 39%, did not appear to be out of line to Niesz. No one at the meetings held during the week of October 18, 1957, ever expressed to Niesz the idea that the purchase price of the Kelly stock would be paid for some other way than out of the assets of United. It all hinged on the plan of the mortgages all the way through. Heineman, representing United and American, prepared the minutes of the meetings held on October 17 and 18, 1957. On October 18, 1957, Niesz, Croydon, Ballantyne and Heineman knew that the mortgages were not yet finally committed. (O.T. 710-717; R.T. 488)

**(u) Evidence:**

Dr. Sabo put $115,000 into American; $52,000 on October 18, 1957, $23,000 on October 28, 1957, and approximately $40,000, which was used to purchase the Statewide Benefit Insurance Company. *Objection:* "This is objected to, Sir. This is part and parcel of the same testimony which has been excluded, and this is in no way material." (O.T. 736-738; R.T. 542)

**(v) Evidence:**

Dr. Francis I. Sabo invested approximately $115,000 in American. Croydon, Pegram, Niesz, Ballantyne and Sabo did not intend to loot United of its liquid assets in order to pay Kelly for his stock. *Objection:* "If your Honor please, I think we have objected to this testimony for several grounds * * * Getting down to the $115,000, we claim this is not material because the $115,000 was not there at the time of this transaction." (O.T. 832, 856, 869; R.T. 356, 489-492)

**(w) Evidence:**

Niesz and Ballantyne discussed with Eugene Tompane the possibility of acquiring the United stock. They wanted to know

whether or not Phoenix Title & Trust Co. would be willing to act as trustee in holding bonds or mortgages which would be considered as admitted assets, acceptable to the Insurance Department. Tompane advised Niesz and Ballantyne that Phoenix Title would be willing to act as trustee. A number of life insurance companies in the state previously had had a part of their financing obtained by way of certificates of contribution, generally in the form of cash or negotiable securities. The program discussed by Niesz and Ballantyne involved certificates of contribution. Niesz and Ballantyne asked Tompane whether or not mortgages or other securities could be made available from any source. Tompane told them that he knew of one man in particular who sought a higher yield on mortgages held by him. Tompane discussed the matter with the mortgageholder over the telephone. He advised that he would be interested in a proposition if it was acceptable to his attorney. This information was conveyed by Tompane to Niesz and Ballantyne. Tompane accompanied Niesz and Ballantyne to see Mr. Toll, the Director of Securities of the Arizona Corporation Commission. It was Tompane's recollection that Toll advised him that it would not be necessary to "register this as a security". Tompane discussed the matter with Mr. Bushnell over the telephone "to verify certain of the statements that had to be acceptable to the Commissioner, etc." He was advised "that it could be worked out." Subsequent to October 18, 1957, Tompane had a conference with representatives of American with respect to the requirements with respect to a trust document. The person who Tompane had in mind held a mortgage of $175,000. Tompane called him around the end of the year and found that he had died a few days prior thereto. *Objection:* "I think that would be objected to because it is immaterial. * * * That is objected to. * * * That is objected to as hearsay. * * * I take it I have an objection to this?" (R.T. 393-408)

**(x) Evidence:**

"It is our offer to prove by the witness, Richard Johnson, that he knew Mr. Croydon in the summer in 1957; that he knew his reputation for ability and integrity as an insurance man and an actuary, and that he had an excellent reputation in that respect." *Objection:* "That is objected to." (R.T. 469)

**(y) Evidence:**

Prior to October 18, 1957, Niesz and Ballantyne each had an excellent reputation for ability and integrity in the insurance business. *Objection:* "Objection, Sir." (R.T. 477-478)

**(z) Evidence:**

In the summer of 1957, Dr. Sabo had an excellent reputation for professional ability and integrity. Pegram had an excellent reputation for business ability and integrity. In the summer of 1957, Landoe had an excellent reputation for professional ability and integrity. *Objection:* "Objection." (R.T. 523-524)

**(aa) Evidence:**

At the time of the merger of United with Provident in 1959, it was necessary to increase the surplus or reserves of Provident. Provident did not have sufficient reserves to take over the business in force of United and it necessitated Provident finding ways and means to acquire additional assets to effect the merger. Provident found persons who were willing to assign to it certain assets in the form of first mortgages in consideration of certificates of contribution and the payment of certain interest on assets which were acquired. This would be considered a form of loan. Provident issued certificates of contribution containing certain obligations to pay interest, etc. Defendants' Exhibit F (a form of certificate of contribution) is a form that is supplied by the Insurance Director's Office, Mr. Bushnell's office. Exhibit E is the trust agree-

ment that was entered into between Provident, Mrs. Koozer and Phoenix Title & Trust Co. Exhibit F discloses a contribution of $10,400 in the form of a first mortgage on real estate. Exhibit E and Exhibit F "go together as a bundle." Mr. Bushnell approved the merger. Thereafter, Provident carried on its books as an asset and part of its surplus the mortgages which were covered by the certificate of contribution. A year or two after the merger, Provident secured additional mortgages by way of certificates of contribution. The mortgages are carried on the books of Provident as an asset. *Objection:* "Objection to this question, and to this entire line. * * * I move to strike his testimony, Sir, as immaterial." (R.T. 527-537)

**(bb) Evidence:**

Dr. Sabo invested $115,000 in American. (O.T. 1094-1095; R.T. 543)

**(cc) Evidence:**

Hammet's evaluation of 38,000 shares of United stock at zero had nothing to do with the going price of the stock. Hammet did not inquire into any recent sales of stock in United as to what had been offered and what had been paid. Hammet's valuation was not even a computed formula set forth in the Insurance Code. Hammet's opinion as to the value of the United stock had nothing to do with the fair market value of the stock whatsoever. It had nothing to do with what somebody else was willing to pay for it. Hammet's attitude with respect to the American stock was the same. He didn't take into consideration what somebody else was willing to pay for it. The amount of insurance in force by a particular company would have a bearing upon the value of the stock. On October 18, 1957, United had some 6½ million dollars of insurance in force. If Hammet had placed a value thereon of $20 a $1,000, it still would not have had cured the impairment.

United's premium was roughly $180,000 per year. *Objection:* "That is objected to Sir * * * It is the same kind of vague testimony other people are talking about that may have some value, but it never comes to the point where it is probative and cogent evidence for the jury to consider." (O.T. 1060-1063; R.T. 544)

**(dd) Evidence:**

"113* During August of 1957 Sabo had three discussions with Ballantyne in Bozeman, Montana about the formation of a holding or investment company to acquire life insurance companies in Arizona.

"114 No persons other than Sabo and Ballantyne were present at any of the three discussions which took place in August of 1957.

"115 Pegram first talked with John Ballantyne in Bozeman, Montana during August of 1957. The conversation was held at the request of Sabo who asked Pegram to find out what the latter could do about a proposal made to Sabo by John Ballantyne that Sabo invest in a proposed life insurance management company in Phoenix, Arizona.

"116 During the August, 1957 conversation with Ballantyne in Bozeman, Pegram was told of a plan for setting up a holding or management company for the purpose of acquiring interests in life insurance companies and entering into management contracts with beneficial life insurance companies in Arizona."

*Objection:* "If your Honor please, I think this whole subject from here on involves other people, other defendants." (T.R. 103-104, R.T. 518-519)

**(ee) Evidence:**

"121 After talking with Ballantyne, Sabo sent Pegram, his 'closest and most trusted friend' and a business associate, to Phoenix to investigate 'this possibility of an investment'.

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*Nos. 113, et seq. refer to the numbers of the "Admitted Facts" contained in the Pretrial Order.

"122 Pegram asked Landoe, an attorney from Bozeman, Montana, to come along with him on the early September, 1957 trip to Phoenix for Sabo.

"123 Landoe is a lawyer who practiced law in Bozeman, Montana during 1957. He has practiced law in Montana for 33 years, is a graduate of the University of Missouri at Kansas City where he received an LL.B. degree in 1932, and also attended Montana State College. During his years of practice he has counseled and advised clients with respect to matters involving corporate law.

"124 Landoe had previously acted as Sabo's attorney.

"130 During the conversations and meetings held on or about September 10, 1957 in Phoenix between Pegram, Landoe, Croydon, Niesz and Ballantyne, the main subjects discussed were the setting up of a management company to manage and acquire life insurance companies, the amount of capital needed to accomplish such an objective, the feasibility of such a company, and how such a company would operate.

"131 During his September 10, 1957 stay in Phoenix with Pegram, Landoe talked to Harry Goss and Eugene Tompane about the reputation and financial responsibility and experience of Croydon, Niesz, and Ballantyne, and talked with each of the latter three men about the financial responsibility and reputation and experience of the others.

"135 After returning to Bozeman, Montana after the September 10, 1957 trip and meetings in Phoenix, Arizona, Pegram and Landoe conveyed to Sabo the information which they had obtained in Phoenix concerning the formation of the investment or holding company which was to acquire and manage life insurance companies.

"136 Landoe and Pegram recommended to Sabo that if he was interested in the proposal to form an investment or holding company to acquire and manage life insurance companies, he should go to Phoenix and look into the matter personally.

"140 On the second trip to Phoenix on or about September 27, 1957, Landoe again went with Pegram at the request

of Sabo. Sabo went to Phoenix by himself, and Landoe and Pegram met him there.

"141 The purpose of the second trip to Phoenix, Arizona, made by Sabo, Pegram and Landoe, on or about September 27, 1957, was to discuss the proposal to form a holding company which was to acquire and manage life insurance companies.

"143 While in Phoenix, Arizona, on or about September 27, 1957, Sabo, Pegram, Landoe, Croydon, Niesz and Ballantyne did discuss the formation of an investment or holding company to acquire and manage life insurance companies.

"149 Niesz, Croydon, Ballantyne, Goss, Landoe and Pegram were the only persons with whom Sabo talked, while in Phoenix, about the formation of an investment or holding company to acquire life insurance companies in Arizona.

"150 Landoe talked only with Goss, Tompane, Croydon, Niesz and Ballantyne concerning the reputation, financial stability and experience of Croydon, Niesz and Ballantyne.

"155 On or about September 28, 1957, while in Phoenix, Arizona, Sebo entered into a verbal preincorporation agreement with and among Pegram, Landoe, Croydon, Niesz, and Ballantyne, to form a corporation to be known as American Security Investment Company.

"158 At the pre-incorporation meeting of American held on or about September 27, 1957, it was stated by Sabo that he had $115,000.00 to invest in the holding company, and that he could acquire additional capital.

"159 Sometime during the meetings during the September 27, 1957 stay in Phoenix, Sabo stated that he would subscribe to stock in the investment or holding company to be formed, and would invest the sum of $115,000.00 at about the time of the formation of such company and would make arrangements to secure additional capital as it was needed.

"160 It was Sabo's understanding that he was to raise $115,000.00 to be invested in American Security Investment Company upon organization."

*Objection:* "The same objection." (T.R. 104-109, R.T. 520)

**(ff) Evidence:**

"178 After American Security Investment Company was organized, Sabo owned over fifty (50) per cent of the voting stock.

"188 Sabo wired or telegraphed $52,000 to American on October 18, 1957 at the request of Croydon.

"189 Prior to October 18, 1957, Landoe knew that Sabo planned to send money to Phoenix to the credit of American."

*Objection:* "The same objection." (T.R. 110-112; R.T. 520)
*Evidence:*

Exhibit 50A, consisting of the Pre-Incorporation agreement executed by the incorporators of American. *Objection:* "This is objected to Sir. It is an undated Pre-Incorporation Agreement. * * * It would be very prejudicial and misleading to the jury." (R.T. 543-544)

**(gg) Evidence:**

"266 On February 7, 1959, a merger agreement was entered into between United Security Life and Provident Security Life Insurance Company. The terms of that agreement provided that 38,798 shares of United stock theretofore held by American Security Investment Company were to be cancelled, and all rights therein relinquished and released. Subsequently, in 1959, the said 38,798 shares of United stock were delivered to Provident Security Life Insurance Company and cancelled."

*Objection:* "Your Honor ruled on that subject this morning." (T.R. 132; R.T. 521)

## APPENDIX C

The trial Court erred in its charge to the jury, namely:

**(a) Charge:**

"The particular acts or omissions on the part of the defendant DePinto, which plaintiffs allege occurred and amounted to negligence or breach of fiduciary duty are as follows: Acceptance of the office of director without intending to discharge the duties and responsibilities of director; delegating or relinquishing his responsibilities as a director to Kelly; failing to attend directors' meetings; failure to examine minutes, records and transactions and documents of the corporation; failure to keep himself advised by reasonable inquiry as to important transactions of the corporation; and particularly as to the transactions in question resulting in the transfer to Kelly of corporate assets; failure to investigate and to require measures for protection of the corporation with respect to conditions and transactions potentially harmful to the corporation and stockholders when such were brought to his attention or of which he should have learned in the exercise of reasonable care to assure that adequate funds, property, and security be obtained by the corporation in return for the transfer to James E. Kelly of substantial assets of United Security Life." (R.T. 570)

*Objection:*

"Now, with respect to the instructions, we first except and object to the instruction with respect to the contentions of the plaintiff in this matter, and you referred to particular acts, such as acceptance of office without intending to perform the duties of the office delegating responsibilities, failure to keep advised, failure to investigate, and so forth.

"It is our position, if your Honor please, that the charge that was made against the defendant as found in Count 6 and Count 7 of Plaintiff's complaint, that in Count 6 the only charge is that DePinto caused United Security Life to transfer $314,794.19, and so forth. That is one of the charges.

"Further, that he was liable for breach of duty by permitting the defendant United Security Life to enter into the agreement for the transfer of the assets, and in Count 7 it is charged that the defendant negligently transferred control of United to Croydon, Sabo, and so forth.

"Under the circumstances, your Honor, when you charged the jury that if the dependant DePinto was guilty of failing to do what you have indicated, or had breached his duty, as you have laid down, you departed from the charges that were made against him in the complaint, and under those circumstances, the jury would be in a position to bring in a verdict against him if he found that DePinto was guilty of some deriliction as the Court had permitted him to do, rather than as claimed in the pleadings." (R.T. 597-598)

**(b) Charge:**

"However, any of the following acts or omissions, if determined by the jury to have resulted from a failure to exercise reasonable care, may be found to constitute negligence and breach of fiduciary duty chargeable to a director, failure to attend directors' meetings, failure to examine minutes and transaction documents subject to a director's approval, failure to make reasonable inquiry as to important transactions of the corporation, and failure to act wtih respect of conditions and transactions potentially harmful to the corporation and its stockholders when such are brought to the director's attention, or of which he should have learned as a director exercising reasonable care." (R.T. 578)

*Objection:*

"Again, that matter was repeated by the Court when you advised the jury that Dr. DePinto could be held guilty of negligence by failing to attend, by failing to examine minutes, and so forth, and these matters are not really at issue in the case. The only issue in the case was whether or not Dr. DePinto was negligent in participating in the election of the Niesz group, and whether he is guilty of negligence with respect to these other matters has nothing to do with

whether or not he was liable for the transactions occurring on October 18, 1957, because his failure to attend and examine minutes and so forth could not under any circumstances have been the proximate cause.

"We feel by giving those instructions, Dr. DePinto was prejudiced." (R.T. 598-599)

**(c) Charge:**

"The law does not permit a director of a corporation to remain silent and inactive when he knows or in the exercise of reasonable care by him, he should know, that an illegal transaction, or one potentially harmful to the corporation is being attempted by officers or other directors of the corporation. Each individual director must make such efforts as are required in the exercise of reasonable care, on his part, to prevent the consummation of such transactions unless and until reasonable and adequate precautions be taken to protect against loss by the corporation.

"If by negligent acquiescence, a director permits corporate assets to be diverted or transferred to the loss of the corporation, such director is liable to the corporation for damages proximately resulting therefrom." (R.T. 579)

*Objection:*

"You gave the instruction that a director cannot remain silent while an illegal transaction is being attempted, and he must make an effort to be present at the directors' meetings, and he can be held liable for acquiescence with respect to acts taken at a Board of Directors' meeting. This we believe, your Honor, would give the jury leeway to conclude that Dr. DePinto had in some way participated in or acquiesced in the resolution adopted by the Niesz group, and at that time when Dr. DePinto was not a member of the board of directors, and under those circumstances he could not be charged with the responsibility on the basis of acquiescence. In other words, if he wasn't a director at that time, he had no duty to know what was going on at that meeting

and couldn't be charged with acquiescence in the meeting with respect to which he was not a member of the Board." (R.T. 600)

**(d) Charge:**

"A resignation specified therein to take effect upon acceptance does not become effective until it is accepted." (R.T. 582)

*Objection:*

"The Court instructed the jury with respect to resignations and that they would take effect only upon the acceptance and so forth.

"There really wasn't any issue in the case with respect to that matter, your Honor, because it was admitted that Dr. DePinto's resignation was accepted, so there wasn't any question of it having taken place.

"The objection to the instruction is that might leave some doubt in the minds of the jury as to whether or not his resignation had become effective." (R.T. 600)

**(e) Charge:**

"The fact that a director was not personally present at a particular directors' meeting at which a transaction later in controversy was approved will not in itself relieve the absent director from a director's responsibility for such transaction.

"In this connection you are instructed:

"1. The absent director received prior notice of the meeting as prescribed in the corporate by-laws and practice, or approved a waiver of such notice, he will be held responsible for corporate action taken at the meeting unless within a reasonable time after the meeting, he takes reasonably adequate steps to have his objection and dissent to such action specifically recorded in the minute records of the corporation.

"2. If an absent director did not receive or waive notice of such meeting, but he actually knew, or by the exercise of reasonable care should have known, of corporate approval of a contested transaction, and thereafter the director failed

to take reasonable prompt steps to protest the corporate action and record his objections and dissent thereto in the minute records of the corporation, the absent director would have a director's responsibility for the contested transaction even though he did not attend the meeting, or in the latter instance, waived notice thereof; that is, if he had known of the transactions being conducted at a purported meeting, a special meeting of directors of the corporation held without notice of the meeting as prescribed by corporate laws or waiver thereof by some directors is illegal, and corporate action taken at such meeting is invalid unless afterward ratified. Corporate action taken by some directors at such a meeting thereafter may be ratified by the absence directors at a later legal meeting, or by subsequent corporate transactions pursuant to action taken at the meeting, which is known to and approved by the absent directors.

"While a resolution at a special directors' meeting at which some directors did not have timely notices is invalid, if a director does not object to such resolution or action taken pursuant thereto within a reasonable time after he has, or in the exercise of reasonable care should have, acquired knowledge of corporate action taken pursuant to such resolution, the director's failure to object to such corporate action may be found to be ratification of such director of the resolution taken at the meeting otherwise invalid as to him." (R.T. 583-584)

*Objection:*

"Then you gave a couple of instructions, your Honor, which I think possibly you may have inadvertently done. They appear to be applicable to the defendant Duhame rather than to the defendant DePinto, because it talks about if he received notice, and then if he learned about it, and doesn't object about what occurred at that meeting, why, then he can be held liable, a corporate action by some directors that an illegal meeting may be ratified, and there could be no such issue in the case so far as the defendant DePinto is concerned. There is no showing of any irregular

act that took place by the Board of Directors while he was a member of the Board, and the instructions, if your Honor please, leave the inference that Dr. DePinto was in a position to have ratified what occurred at the meeting on October 18, 1957 at 4:15 when he was no longer a member of the Board of Directors and was not in a position to either repudiate or ratify." (R.T. 600-601)

**(f) Charge:**

"Although several persons may be adjudged liable for the whole of damages or loss sustained, actual recovery thereon is limited to the total loss sustained. In other words, only a single actual recovery may be made for any item of damage. In these circumstances, if you find defendant DePinto liable, you must not speculate or consider in any way what portion of the total loss that may ultimately actually be recovered from defendant DePinto." (R.T. 587)

*Objection:*

"We think that that instruction was prejudicial in the sense that it called the attention of the jury to the fact that the Court feels that Dr. DePinto might not have to pay all of this loss. It is our position that there was nothing in the record which justified that instruction, and that by commenting on it, the Judge then brought to their attention the possibility that Dr. DePinto might not have to pay all of this loss, and I think the Court recognizes that if a judgment were rendered against Dr. DePinto, it is certainly possible that he could be held responsible or at least his property could be subjected to the payment of the whole claim.

"So under the circumstances, the jury might very well go out and say, well, Dr. DePinto is only going to have to pay maybe twenty percent of this, so what difference does it make? We think that was prejudicial, if your Honor please." (R.T. 601-602)

## APPENDIX D

The trial Court erred in failing to charge the jury in accordance with the requested Instructions of appellant, namely:

**(a) Defendant DePinto's Requested Instruction No. 4:**

"You are further instructed that even if you find by a preponderance of the evidence that the defendant DePinto was negligent in not making an investigation of the backgrounds and reputations of Croydon, Niesz, Ballantyne, Pegram, Sabo and Goss before participating in their election to the board of directors of United Security Life, your verdict must nevertheless be for the defendant DePinto unless you further find by a preponderance of the evidence that the backgrounds and reputations of such men would justify the conclusion that in all likelihood they would conduct the affairs of United in a wrongful, irregular or negligent manner. In other words, if you find that at the time Croydon, Niesz, Ballantyne, Pegram, Sabo and Goss were placed in control of United Security Life they were reputable business and professional men, then your verdict must be for the defendant DePinto." *Salt River Valley Water User's Ass'n. v. Cornum,* 63 P.2d 639 (Ariz. 1936). (T.R. 82)

*Objection:*

"If the Court please, the defendant excepts and objects to the charge of the Court to the jury in the following particulars, in failing to give defendant DePinto's requested instruction Number 4, for the reason that it is a correct statement of law applicable to the issues in this case, and in particular, it limits the issues as they are in effect limited by the pleadings and by the evidence." (Tr. 595)

**(b) Defendant DePinto's Requested Instruction No. 5:**

"You are instructed that you may not render a verdict against the defendant DePinto merely because you should find that while he was a director of United Security Life he failed to give attention to its affairs. The plaintiff in this

action is not entitled to a verdict against defendant merely because it appears that he should have been more active in his duties as a director of United Security Life. And the burden is upon the plaintiff of proving that the performance of the defendant DePinto's duties as a director of United Security Life would have avoided loss and what loss it would have avoided. In order to be entitled to a verdict at your hands the defendant DePinto is not subject to the burden of proving that loss, if any, to United Security Life could have happened whether he had done his duty or not." *Barnes v. Andrews,* 298 Fed. 614 (D.C.S.D.N.Y., 1924) (T.R. 83)

*Objection:*

"MR. JENCKES: The defendant DePinto excepts and objects to the failure of the Court to instruct the jury fully in accordance with his instruction No. 5.

"I think the record shows that a part of that instruction was incorporated. However, I do not believe that the jury was told that plaintiff in this action is not entitled to a verdict against the defendant merely because it appears that he should have been more active in his duties.

"THE COURT: The very words I used.

"MR. JENCKES: The rest of the instruction, in other words, the second, third and fourth sentences I think you overlooked." (Tr. 596)

**(c) Defendant DePinto's Requested Instruction No. 8:**

"You are further instructed that unless you find by a preponderance of the evidence that the loss to United Security Life, if any, resulting from the transfer of certain of its assets to American Security Investment Company on or about October 18, 1957, was proximately caused by some negligent act or omission of the defendant DePinto, then your verdict must be for such defendant. To constitute proximate cause such loss must have been the natural and probable consequence of the negligence, if any, of the defendant DePinto, and have been of such character as an ordinarily prudent person ought to have foreseen might probably occur as the

result of such negligence. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury; but when it occurs it must appear that it was a natural and probable consequence of his negligence. If the negligence does nothing more than furnish a condition by which the loss is made possible, and that condition causes a loss by the subsequent independent act of third persons, the two are not concurrent and the existence of the condition is not the proximate cause of the injury. When the act of third persons intervenes, which is not a consequence of the first negligent act or omission, and which could not have been foreseen by the exercise of reasonable diligence, and without which the injurious consequence could not have happened, the first act or omission is not the proximate cause of the injury. If the act of third persons, which is the immediate cause of loss, is such as in the exercise of reasonable diligence would not be anticipated, and the third persons are not under the control of the one guilty of the first act or omission, the connection is broken and the first act or omission is not the proximate cause of the loss." *Salt River Valley Water Users' Ass'n. v. Cornum*, 63 P.2d 639 (Ariz. 1936) (T.R. 86)

*Objection:*

"Defendant DePinto excepts to the failure of the Court to give his instruction Number 8 in toto. If my recollection is correct, I believe the Court failed to instruct to the effect that if the negligence does nothing more than furnish a condition by which the loss is made possible, that condition causes a loss by the subsequent independent act of third persons, the two are not concurrent and the existence of the condition is not the proximate cause of the injury.

"Further, we believe that the Court failed to give that portion of the instruction reading, 'If the act of third persons, which is the immediate cause of loss, is such as in the exercise of reasonable diligence would not be anticipated, and the third persons are not under the control of the one guilty of the first or omission, the connection is broken and

the first act or omission is not the proximate cause of the loss.'

"It is our position, your Honor, that those portions that I have read of that instruction should be given because they are specifically applicable under the evidence, and they are a correct statement of the law." (Tr. 596-597)

## APPENDIX E

*In the United States District Court*
*for the District of Arizona*

| | |
|---|---|
| ALBERT J. DOIG, on Behalf of Himself and All Other Shareholders of Provident Security Life Insurance Company,<br>*Plaintiff,*<br>v.<br>PROVIDENT SECURITY LIFE INSURANCE COMPANY, UNITED SECURITY LIFE, ANGUS J. DEPINTO, ELMER W. DUHAME, FRANCIS I. SABO, EDWIN B. PEGRAM, and HJALMAR B. LANDOE,<br>*Defendants.* | No. Civ. 2974—Phx.<br>AFFIDAVIT OF BIAS OR PREJUDICE |

STATE OF ARIZONA
County of Maricopa—ss.:

ANGUS P. DEPINTO, being first duly sworn, deposes and says that he is one of the defendants in the above-entitled action and makes this Affidavit pursuant to the provisions of 28 U.S.C.A., § 144; that the Honorable George H. Boldt, before whom this matter is pending, has a personal bias or prejudice either against Affiant or in favor of Plaintiff; that the facts and the reasons for Affiant's belief that bias or prejudice exists are as follows:

Upon the original trial of this action the jury rendered a special verdict wherein it found that Affiant was not guilty of negligence or breach of fiduciary duty which proximately caused or contributed to cause loss and damage to United Security Life, the predecessor in interest of Provident Security Life Insurance Company. Plaintiff moved that all of the verdicts be set aside and that judgment be entered against Affiant and others in accordance with plaintiff's Motion for a Directed Verdict, which was

made at the close of the testimony. Judge Boldt refused to give effect to the jury verdict and granted judgment for the plaintiff N.O.V. He erroneously refused to recognize the verdict of the jury as having any binding effect.

During the trial, the defendants offered in evidence a Merger Agreement pursuant to which United Security Life had been merged in Provident Security Life Insurance Company after the filing of the action. Judge Boldt rejected the offer and held that there was no issue as to the merger and that any evidence with respect thereto was irrelevant and immaterial. When Mr. Rehnquist, an attorney for one of the defendants, attempted to pursue the matter, he was charged by Judge Boldt with contempt and with attempting to pettifog deliberately and with malice aforethought.

After entry of judgment, Affiant filed a motion for new trial raising numerous legal questions and also pointing out specific errors in the findings of fact entered by Judge Boldt. The Judge apparently gave little, if any, consideration to the motion, notwithstanding the fact that Finding No. 19(d) was contrary to the undisputed evidence.

After the Judgment was reversed by the Court of Appeals for the Ninth Circuit in Cause No. 17114 and the case was remanded to the District Court for further proceedings, Judge Boldt again failed to give objective consideration to the legal and factual questions raised by Affiant. At a pretrial conference held on March 9, 1962, Judge Boldt admonished attorneys for the defendants that they should not "go shopping" for another judge; that he intended to stay with the case until its conclusion. Insofar as known to Affiant, this warning was wholly unprovoked.

Affiant moved that Judgment be entered in his favor upon the jury's verdict and in the alternative demanded a trial by jury of all of the issues herein. The motion was summarily denied. Notwithstanding Affiant's objections, Judge Boldt entered supple-

mental findings of fact and conclusions of law wherein he failed to correct or modify his original Finding No. 19(d) which was contrary to the evidence. In addition to again entering Judgment against Affiant in the amount of $314,794.19, Judge Boldt erroneously elected to include interest thereon from October 18, 1957, which had the effect of increasing Affiant's liability to the extent of approximately $100,000. The second judgment was reversed by the Court of Appeals in Cause No. 18245.

After the remand of this case to the lower court following the first appeal, Gorsuch filed an action against Provident Security Life Insurance Company for the purpose of attempting to set aside the merger of United Security Life with Provident. In that case Judge Boldt denied a Motion For Summary Judgment filed on behalf of Provident. He then granted plaintiff's Motion For Default and Motion For Summary Judgment. Provident's Motion to have the default set aside was denied. The Court of Appeals held that the failure of Judge Boldt to grant Provident's Motion to open the default was an abuse of discretion. The Court of Appeals also held that Judge Boldt had erred in at least four particulars in entering Judgment setting aside the merger.

On the 24th day of September, 1964, Affiant's attorney, Jos. S. Jenckes, Jr., transmitted to Judge Boldt a letter requesting that he consent to the transfer of this case to another Judge, a copy of such letter being attached hereto as Exhibit "A", and by reference incorporated herein. On October 9, 1964, Judge Boldt wrote a letter to Mr. Jenckes in which he rejected such request, a copy of which letter is attached hereto as Exhibit "B", and by reference incorporated herein.

On the 13th day of April, 1964, attorneys for plaintiffs filed herein a Motion For Summary Judgment on Issue of Liability Only. Notwithstanding the fact that the granting of such Motion will be in derogation of and contrary to the mandate and decision of the Court of Appeals for the Ninth Circuit (*DePinto v. Provi-*

*dent Security Life Insurance Company,* 323 F.2d 826), requiring a new trial before a jury, Judge Boldt has issued a Memorandum dated November 9, 1964, a copy of which is attached hereto as Exhibit "C", and by reference incorporated herein, which Memorandum discloses that Judge Boldt intends to consider said Motion For Summary Judgment on the merits.

It is Affiant's belief that Judge Boldt is not able to consider the issues involved in this action with an open mind. The record demonstrates the inability of Judge Boldt to view the affairs of United Security Life with that degree of judicial detachment and objectivity which should govern all actions of a trial judge.

Affiant believes that in the light of *Whitaker v. McLean* (C.A., D.C.) 118 F.2d 596, and *U.S. v. Ritter* (10th Cir.) 273 F.2d 30, this Affidavit is timely and within the purview of 28 *U.S.C.A.,* § 144.

ANGUS J. DEPINTO
Angus J. DePinto

Subscribed and sworn to before me this 20th day of November, 1964.

My commission expires: March 4, 1968

ALICE J. FITCH
Notary Public

CERTIFICATE OF COUNSEL

Jos. S. Jenckes, Jr., counsel for Angus J. DePinto, hereby certifies that the foregoing Affidavit is made in good faith.

Jos. S. Jenckes, Jr.
Jos. S. Jenckes, Jr.

Copies of the foregoing mailed
this 20th day of November, 1964, to:

McLane & McLane, 2101 Connecticut Ave., N.W.,
Washington 8, D.C., Attorneys for Plaintiffs;
O'Connor, Anderson, Westover, Killingsworth
& Beshears, 1000 Central Towers, Phoenix,
Arizona, Attorneys for Elmer W. Duhame;
Elsing & Crable, Bank of Arizona Bldg.,
Phoenix, Arizona, Attorneys for Provident
Security Life Insurance Co.;
Joseph B. Gary, Esq., Suite 1,
Professional Bldg., Bozeman, Montana,
Attorney for Hjalmer B. Landoe; and
Drysdale, Anderson & Sabo, 316 First
National Bank Bldg., Bozeman, Montana,
Attorneys for Sabo and Pegram

Jos. T. Jenckes, Jr.

## APPENDIX F

### Exhibits

| Exhibit Number | Description | Reporter's Transcript Page Nos. Ident. | Rec'd. | Rej'd. |
|---|---|---|---|---|
| 4-B | Minutes of Directors Meeting, United Security Life, 3-29-55 | 192 | 193 | |
| 4-G | Minutes of Directors Meeting, United Security Life, 11-15-55 | 201 | 201 | |
| 5-F | Minutes of Meeting of Board of Directors of United Security Life, 2-19-57 | 203 | 203 | |
| 5-G | Minutes of Meeting of Board of Directors of United Security Life, 10-18-57, 4:00 P.M. | 215 | 215 | |
| 5-H | Minutes of Meeting of Board of Directors of United Security Life, 10-18-57, 4:15 P.M. | 215 | 215 | |
| 16 | Page 61 of Report of examination of the affairs of United Security Life, prepared by Guy L. Hammett | 225 | 264 | |
| 32 | Cash Journal of United Security Life for 1957 | 225 | 283 | |
| 33 | Ledger of United Security Life, October to December, 1957 | 225 | 283 | |
| 34 | Ledger of United Security Life, October 1956 to October 1957 | 225 | 283 | |
| 36 | Cash Journal of United Security Life for 1956 | 225 | 283 | |
| 37 | General Ledger of United Security Life for 1956 | 225 | 283 | |
| 38 | Stockkholders' List | 221 | 221 | |
| 43 | Debit transferring $52,000 to American Security Investment Co. from First National Bank of Bozeman, Montana | 541 | 541 | |
| 45 | Debit transferring $23,000 to American Security Investment Co. by order of Edward B. Pegram | 541 | 541 | |
| 50-A | Pre-Incorporation Agreement, American Security Investment Co. | 543 | | 544 |
| 50-B | Certified copy of Articles of Incorporation, American Security Investment Co. | 461 | 461 | |
| 50-N | Minutes of meeting of Board of Directors of American Security Investment Co., 10-18-57, including waivers | 215 | 215 | |

| Exhibit Number | Description | Reporter's Transcript Page Nos. Ident. | Rec'd. | Rej'd. |
|---|---|---|---|---|
| 52 | Journal of American Security Investment Co., October 1957 to December 1958 | 225 | 283 | |
| 53 | General Ledger American Security Investment Co., October 1957 to December 1957 | 225 | 283 | |
| 58 | Agreement between American Security Investment Co. and James E. Kelly for purchase of stock | 298 | 298 | |
| 59 | Agreement between American Security Investment Co. and James E. Kelly for purchase of agent's account | 299 | 300 | |
| 60 | Agreement between American Security Investment Co. and United Family Guild for purchase of stock | 299 | 300 | |
| 83 | Income Tax Return of Kelly for 1957 | 224 | 300 | |
| 85 | Photostatic copy of check by United Security Life to American Security Investment Co., October 18, 1957, for $13,588.91 | 221 | 221 | |
| 86 | Photostatic copy of check by United Security Life to American Security Investment Co., October 18, 1957, for $9,057.28 | 221 | 221 | |
| 97 | Prospectus of United Security Life | 222 | | 224 |
| 98 | Prospectus Life Underwriters, Inc. | 222 | | 224 |
| 101 | Telegram to Bozeman, Montana signed by Croydon | 344 | | 344 |
| A | Draft of Contract | 450 | 450 | |
| B | Draft of Agreement between American Security Investment Co. and James E. Kelly for purchase of stock | 450 | 450 | |
| C | Draft of Contract | 450 | 450 | |
| D | Appointment of Statutory Agent | 483 | | 483 |
| E | Trust Agreement between Provident Security Life Insurance Co., Koozer and Phoenix Title & Trust Co. | 536 | | 536 |
| F | Form of Certificate of Contribution | 536 | | 536 |
| G | Merger Agreement between Provident Security Life Insurance Co. and United Security Life | 541–4 | | 541–4 |